[redacted]

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 28406

TRANS WORLD AIRLINES, INC.,
Plaintiff-Appellee,

against

HOWARD R. HUGHES and RAYMOND M. HOLLIDAY,
Defendants,

and

HUGHES TOOL COMPANY,
Defendant-Appellant,

and

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, METROPOLITAN LIFE INSURANCE COMPANY, IRVING TRUST COMPANY, DILLON, READ & CO. INC., BEN-FLEMING SESSEL, JAMES F. OATES, JR., HARRY C. HAGERTY and CHARLES C. TILLINGHAST, JR.,
Additional Defendants-Appellees,

and

ERNEST R. BREECH,
Additional Defendant.

APPENDIX TO JOINT BRIEF OF ADDITIONAL DEFENDANTS-APPELLEES AND TO BRIEF OF PLAINTIFF-APPELLEE

CRAVATH, SWAINE & MOORE,
Attorneys for Additional Defendants The Equitable Life Assurance Society of the United States, Metropolitan Life Insurance Company, James F. Oates, Jr. and Harry C. Hagerty,
1 Chase Manhattan Plaza,
New York 5, N. Y.

WINTHROP, STIMSON, PUTNAM & ROBERTS,
Attorneys for Additional Defendants Irving Trust Company and Ben-Fleming Sessel,
40 Wall Street,
New York 5, N. Y.

Dated: September 30, 1963

DUNNINGTON, BARTHOLOW & MILLER,
Attorneys for Additional Defendant Dillon, Read & Co. Inc.,
161 East 42nd Street,
New York 17, N. Y.

CHADBOURNE, PARKE, WHITESIDE & WOLFF,
Attorneys for Additional Defendant Charles C. Tillinghast, Jr.,
25 Broadway,
New York 4, N. Y.

CAHILL, GORDON, REINDEL & OTT,
Attorneys for Plaintiff Trans World Airlines, Inc.
80 Pine Street,
New York 5, N. Y.

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Affidavit of Chester C. Davis, August 8, 1961

[281]

[CAPTION]

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

CHESTER C. DAVIS being duly sworn deposes and says:

1. I am an attorney at law and have appeared in this action on behalf of Hughes Tool Company (herein called "Toolco"). I am familiar with the facts and circumstances hereinafter stated.

2. This affidavit is submitted in support of the application of Toolco for an order dismissing the complaint herein on the grounds that said complaint and each of the claims for relief alleged therein fails to state a claim upon which relief can be granted and that this Court lacks jurisdiction over the subject matter of the action and over the subject matter of each of said alleged claims for relief.

3. TWA filed its complaint herein on June 30, 1961. Although Howard R. Hughes and Raymond M. Holliday are named as defendants, I am informed and believe that neither has been served with process and that Toolco is the sole defendant who has appeared herein. The complaint seeks [282] treble damages in an amount in excess of $100 million for alleged violations of the antitrust laws and for temporary and permanent injunctive relief by reason of said alleged violations and by reason of alleged malicious and

willful interference by defendants with TWA's business. The allegations of the first claim for relief relate to the acquisition by Toolco prior to December 31, 1960 of more than 78% of the common stock of TWA and to the acquisition of flight equipment by TWA and the financing thereof during the period from 1939 through 1960. The allegations of the second and third claims relate to Toolco's conduct subsequent to 1960, namely after May 1, 1961, which is alleged (paragraphs 37 to 48) to have constituted a violation of the antitrust laws in the second claim for relief and willful and malicious interference with TWA's business in the third claim for relief.

4. Toolco submits that the claims asserted by TWA should be dismissed for the following reasons:

(a) Since TWA and Toolco are both Delaware corporations, jurisdiction of this Court, if any, is based solely upon alleged violations of the Sherman and Clayton Acts;

(b) As appears from the annexed affidavit of Raymond M. Holliday, the transactions which are alleged in the complaint to constitute violations of the antitrust laws, including the control of TWA by Toolco and the acquisition of a 78% ownership of TWA by Toolco, were subject to and approved by orders of the CAB under Section 408 of the Federal Aviation Act [283] of 1958 (or Section 408 of the Civil Aeronautics Act of 1938 which the Federal Aviation Act superseded).

(c) The CAB entered orders specifically approving as not inconsistent with the public interest all transactions between TWA and Toolco with respect to the ac-

quisition and financing of flight equipment. The Federal Aviation Act (Section 414) exempts and relieves any person affected by any such orders from the operations of the antitrust laws and of all other restraints or prohibitions made by or imposed under authority of law "insofar as may be necessary to enable such person to do anything authorized, approved or required by such order." The complaint does not allege a violation of the Federal Aviation Act or of the orders made by the CAB under Section 408 thereof;

(d) Since the acquisition of complete control of TWA by Toolco and the transactions whereby Toolco acquired and transferred aircraft to TWA or furnished financial assistance to TWA in connection therewith, have all been specifically approved by the CAB, Toolco is exempted and relieved from the operations of the antitrust laws and of all other restraints or prohibitions made by or imposed under authority of law with respect to such transactions;

(e) If it is the position of TWA that Toolco has violated in any way any orders of the [284] CAB relating to Toolco's stock holdings in TWA, to Toolco's control over TWA or to any transaction between Toolco and TWA—and no such violations are alleged—then it would appear that any question as to the scope or the enforcement of such orders is a matter within the jurisdiction of the CAB and not of this Court;

(f) The activities of Toolco subsequent to 1960 which are alleged to have constituted a malicious and willful interference with TWA's business were taken on my advice as counsel to Toolco for the purpose of

protecting Toolco's equitable rights and in particular its rights as the owner of more than 78% of the stock of TWA.

5. All of the acts alleged in the complaint to have been done in and after 1960 were done upon my advice as counsel for Toolco solely in order to protect Toolco's interests as beneficiary under a voting trust created in December, 1960 and as equitable owner of more than 78% of the stock of TWA. The allegations of the complaint refer to the following:

(a) my writing a letter dated May 19, 1961 to TWA and to the Securities and Exchange Commission, pursuant to the instructions of the Commission;

(b) my writing a letter dated May 26, 1961 addressed to the Board of Directors of TWA, the [285] lending institutions who, under the terms of the voting trust agreement and the by-laws of TWA, control the Board of Directors of TWA, and the voting trustees in which I set forth certain matters which materially affected the interest of Toolco in TWA and in which I asked for a meeting to discuss such matters;

(c) my sending a copy of said letter and a telegram to The Boeing Company advising it of certain of Toolco's positions; and

(d) my advising the New York Stock Exchange, at its request, as to Toolco's present intention as to rights received by it from TWA which information was given in order to permit the listing on said Exchange of similar rights granted by TWA to its other stockholders.

Copies of said communications are annexed hereto as Exhibits "A", "B", "C" and "D", respectively. An examination of such communications is itself sufficient to show that they cannot constitute a malicious and willful interference with TWA's business, let alone a violation of the antitrust laws.

6. The circumstances under which such communications were sent confirms the groundless nature of the allegations of the complaint;

(a) On or about May 15, 1961 while I was a member of the firm of Simpson Thacher & Bartlett, Toolco retained me to advise it in connection with matters [286] pertaining to its beneficial ownership of more than 78% of the outstanding stock of TWA, including the acquisition and possible secondary offering by it of certain subordinated income debentures with warrants attached proposed to be offered by TWA to its stockholders pursuant to a registration statement then filed with the Commission but not yet effective. TWA was making such an offering pursuant to an arrangement approved by CAB in order to refund an interim subordinated note in the principal amount of $100 million which had been given by TWA to Toolco in partial repayment of amounts expended by Toolco in connection with TWA's jet equipment program. All of the proceeds of said offering to be received by TWA from the exercise of subscription rights granted to the stockholders of TWA other than Toolco had to be applied by TWA to the refunding of said interim note and none of such proceeds was to be retained by TWA.

(b) An examination of the registration statement with respect to such offering disclosed deficiencies which

in my opinion could lead to the assertion of claims against Toolco as a statutory underwriter or as a controlling person under the Securities Act of 1933, as amended, by reason of its stock ownership in TWA or by reason of said arrangement. I therefore appeared before the Commission on May 18, 1961 in connection with an application by TWA to accelerate the effective date of said registration statement and stated to the Commission that Toolco opposed such acceleration until deficiencies in the registration statement had been corrected. I was directed by the Commission to write to TWA and the Commission a letter setting forth such deficiencies and the facts supporting the basis for the assertion of a possible [287] deficiency. The letter of May 19, 1961 was sent to TWA and the Commission pursuant to this direction.

(c) Thereupon, TWA thereafter twice amended the registration statement so as to correct deficiencies which were set forth in said letter,—a fact which is not mentioned in the complaint—and the allegations of the complaint (paragraph 43) falsely imply that the Commission, after considering the contentions advanced by Toolco accelerated the effective date of the registration statement without recognizing the merit of the position taken by Toolco and without requiring TWA to correct the deficiencies existing in the registration statement filed by TWA with the Commission. After corrective amendments had been made I, on behalf of Toolco, informed the Commission that Toolco had no objection to an acceleration of the effective date of the registration statement as amended.

(d) As a result of a conflict of interest which appeared in relation to the affairs of another client, the firm of

Simpson Thacher & Bartlett withdrew from the representation of Toolco on or about May 22, 1961 and I resigned my membership in that firm in order to continue the representation of Toolco which I had undertaken. Subsequent acts of Toolco complained of by the plaintiff were likewise done at my advice.

(e) When the aforesaid registration statement became effective, I was advised by the New York Stock Exchange (hereinafter "the Exchange") that it would be necessary for Toolco to advise the Exchange, and to announce publicly, its intentions with respect to the subscription [288] rights to be received by it in connection with the offering by TWA to its stockholders. I was further advised that if Toolco failed to do so the Exchange would not list for trading the rights to be received by the minority stockholders of TWA. Accordingly, on May 31, 1961, I advised the Exchange of Toolco's then intention to sell the rights received by it up to an amount which would be dependent on market conditions but which would in no circumstances exceed 85% of the rights which Toolco was to receive. Upon receipt of this advice the Exchange admitted to trading the rights offered to stockholders of TWA other than Toolco. Since all moneys to be received by TWA in such offering from stockholders other than Toolco were to be applied by TWA in refunding of the interim note held by Toolco, any interference by Toolco with such offering would have injured Toolco and not TWA. In fact out of a maximum of approximately $24 million TWA received more than $19 million from such offering which was used by TWA to partially refund said interim note.

(f) Under the terms of the aforesaid voting trust in which Toolco's 78% stock interest has been deposited, The Equitable Life Assurance Society of the United States and Metropolitan Life Insurance Company, as the holders of a majority of certain notes of TWA, have the power to remove, without cause, a majority of the voting trustees and designate their successors. Under the by-laws of TWA, a majority of the voting trustees (having the power to vote a majority of the stock) have the power to remove the directors of TWA without cause and to elect successors subservient to their control.

[289] (g) In connection with my examination of a preliminary registration statement filed with the Securities and Exchange Commission, it appeared that the lending institutions which controlled TWA as aforesaid were proposing to lend to TWA $147 million for the purchase of jet aircraft from The Boeing Company. It also appeared that the proposed loan, being made under conditions which were not competitive, was to be made upon the condition that the entire amount thereof would become due and payable in the event that the voting trust should terminate for any reason. In my opinion the proposed transaction would constitute self-dealing by financial institutions having a fiduciary obligation to Toolco and the other stockholders of TWA by reason of their power to control the management of TWA and would constitute an unjustifiable perpetuation by them of the voting trust which is terminable in accordance with its terms at the end of 10 years or upon the sooner retirement or acquisition by Toolco of the securities of TWA held by the lending institutions. It also appeared that there was substantial reason to believe that the management of TWA, controlled by said lending in-

stitutions, intended, for reasons which in the opinion of Toolco were not related to the best interests of TWA, to fail or refuse to acquire some 13 Convair aircraft which Toolco had contracted to purchase and which Toolco believed would best serve the needs of TWA.

(h) The protection of the legal and equitable interests of Toolco, in my opinion, required that Toolco make known to all interested persons its position with respect to the fiduciary obligations of the lending institutions, the voting trustees and the management of TWA. [290] Accordingly, the letter of May 26, 1961 was sent to the lending institutions, the voting trustees and the directors of TWA. A copy thereof was also sent to The Boeing Company. Since TWA under its arrangements with The Boeing Company could withdraw from its commitments to The Boeing Company if financing arrangements satisfactory to The Boeing Company were not made by May 31, 1961, I caused to be sent the telegram (Exhibit "C" hereto) which informed The Boeing Company of Toolco's position with respect to the financing proposed by the lending institutions controlling TWA.

7. The acts of which TWA complains consist of informing parties directly concerned with claims asserted in good faith by Toolco relative to the obligations and responsibilities of said lending institutions, voting trustees and management of TWA to the owners of TWA, including Toolco as the beneficial owner of more than 78% of TWA's stock.

8. The conduct of Toolco complained of subsequent to 1960 relates to action taken by Toolco since May 1961 upon

advice of its counsel, and can not be regarded as malicious interference with TWA's business, particularly since Toolco is the owner of more than 78% of TWA. The allegations of the complaint relating to action taken by Toolco prior to 1961 relate to action approved or required by orders of CAB, which under the Federal Aviation Act exempts Toolco from the operations of the antitrust laws, if applicable, and from all other restraints or prohibitions made by or imposed under authority of law.

9. The facts stated in this affidavit and in the accompanying affidavit by Mr. Holliday are matters of public record or are based upon documentary evidence which [291] is not subject to dispute. The indisputable facts establish that each of the alleged claims for relief of the complaint fails to state a claim on which relief can be granted and fails to allege facts which establish the jurisdiction of this Court over the subject matter of the action.

WHEREFORE it is respectfully submitted that the complaint herein should be dismissed.

(Sworn to by Chester C. Davis on August 8, 1961.)

Affidavit of Raymond M. Holliday, August 7, 1961

[345]

[CAPTION]

STATE OF TEXAS
COUNTY OF HARRIS } ss.:

RAYMOND M. HOLLIDAY, being duly sworn, deposes and says:

1. I am a Vice President, Secretary and the chief financial officer of defendant Hughes Tool Company (hereinafter "Toolco"). I am also a director of Trans World Airlines, Inc. (hereinafter "TWA"), the plaintiff herein, and one of the three Voting Trustees of approximately 78% of TWA's common stock which is equitably owned by Toolco and which was placed in a Voting Trust in December 1960. Although named as a defendant herein, I have not been served with process or appeared in this action.

2. I make this affidavit in support of the motion of defendant Toolco for an order dismissing the complaint herein. I am fully familiar with all the facts and circumstances hereinafter stated.

3. TWA's complaint seeks treble damages in an amount in excess of $100,000,000 for alleged violations of the antitrust laws and for temporary and permanent injunctive [346] relief by reason of said alleged violations and by reason of alleged malicious and willful interference by defendant with TWA's business. The first claim for relief

relates to the acquisition by Toolco prior to December 31, 1960 of more than 78% of the common stock of TWA and to the acquisition of flight equipment by TWA and the financing thereof during the period from 1939 through 1960. The second and third claims for relief relate to conduct subsequent to 1960.

4. All transactions which are alleged in plaintiff's first claim to constitute violations of the anti-trust laws, including the control of TWA by Toolco and the acquisition of more than 78% of the common stock of TWA by Toolco, were subject to and approved by orders of the Civil Aeronautics Board (hereinafter "the CAB") under Section 408 of the Federal Aviation Act of 1958 (or Section 408 of the Civil Aeronautics Act of 1938). I am informed that said Act (Section 414) exempts and relieves any person affected by any such order from the operation of the anti-trust laws and of all other restraints or prohibitions made by or imposed under authority of law "insofar as may be necessary to enable such person to do anything authorized, approved or required by such order."

5. The activities of Toolco subsequent to 1960 which are alleged to have constituted a malicious and willful interference with TWA's business as well as a violation of the anti-trust laws were taken on the advice of counsel to Toolco that such activities were necessary or desirable in order to protect Toolco's equitable rights.

[347] THE APPROVAL BY THE CAB OF TOOLCO'S CONTROL OF TWA AND OF ALL SIGNIFICANT TRANSACTIONS BETWEEN TOOLCO AND TWA

6. Toolco is primarily engaged in the manufacture and sale of equipment for the oil well drilling industry. It has not at any time manufactured commercial transports and its sole activities with respect to the sale or lease of aircraft to commercial airlines (except for the sale of two DC-6 aircraft originally acquired by Toolco for its own use) have arisen from its efforts to assist TWA in obtaining flight equipment adequate to its needs. It has at no time been in the business of selling or leasing any flight equipment to any airline and the only occasions on which it has made equipment ordered by it available to any airline other than TWA have been when certain equipment ordered by Toolco for use by TWA has proved to be in excess of the need or capabilities of TWA.

7. Toolco first acquired its interest in TWA in 1939 when the airline industry was in its infancy. By the end of 1942 it had acquired approximately 45% of the total outstanding shares of TWA. This acquisition of a controlling interest in TWA was approved by the CAB, under Section 408 of the Civil Aeronautics Act of 1938, as consistent with the public interest, in an opinion and order (6 C. A. B. 153) dated October 17, 1944. Said order provided that such approval would be effective so long as commercial transactions between TWA and Toolco were limited to those involving complete items of property the price of which did not exceed $200.00 each, with the further limitation that the total annual expenditures involved in such

commercial transactions by either party should not exceed $10,000.

[348] 8. Since that date there have been no commercial transactions between TWA and Toolco except as permitted by said order or except after a modification of said order upon a finding by the CAB that the proposed transactions was consistent with the public interest.

9. In 1950 the CAB approved the further acquisition of control of TWA subject to the same conditions contained in the 1944 order. In so doing the CAB recognized that it was approving no less than the acquisition by Toolco of full and complete control over all activities of TWA as is established by the following:

(a) In 1947 the CAB by Order No. E-289 ordered an investigation to determine whether a certain letter agreement dated January 8, 1947 between Toolco and TWA had resulted or would result in an acquisition of control of TWA for which CAB approval was required pursuant to Section 408 of the Civil Aeronautics Act of 1938, as amended, and whether such acquisition and control, if any, was consistent with the public interest and fulfilled the conditions of said Section 408. On June 30, 1948, the CAB entered an order to the effect that such a further acquisition of control had resulted or would result from said letter agreement and that CAB approval was accordingly required (9 C. A. B. 381). In rejecting Toolco's claims that its control of TWA had not increased and could not increase, the CAB stated (pp. 390-391):

"The further basis for respondent's argument that Toolco's control over TWA has not increased

> and can not increase as a matter of fact may be very briefly set at rest. It turns upon the claim that Toolco, by controlling management proxies [349] since October 17, 1944, has, together with such proxies, had the power to take any corporate action necessary with respect to the carrier in compliance with Delaware law. An answer to this claim rests upon the distinction between having the required voting power under Delaware law upon the vote of Toolco alone, as against having such power dependent upon the use of proxies to vote stock owned by others, who may not always acquiesce Further while Toolco has been able to secure proxies sufficient to enable it to control the day-to-day affairs of the carrier, it may not be able to obtain that acquiescence in matters such as merger, consolidation, or dissolution of the carrier. But, even if it be assumed that Toolco could at all times obtain sufficient votes to put in effect any desired corporate action, the fact remains that the letter agreement, through the retirement of the indebtedness therein created by conversion to stock, makes unnecessary any dependence upon other stock interests in TWA. Certainly, therefore, a control relationship has been established where the controlled company, which formerly responded to orders from one person with assistance from others by proxies, or otherwise, now responds or may respond to one person at its sole instance."

It recognized that Toolco's control over the acquisition of flight equipment by TWA presented another element of increased control (p. 391, footnote 18):

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"18. Significant also is the fact that under the supplementary agreement of December 26, 1947, modifying the letter agreement, TWA was required to come to Toolco to obtain consent of the latter before purchasing additional equipment. Certainly this transaction also represents an element of new and increased control arising out of the letter agreement."

(b) On July 10, 1950 the Examiner for the CAB rendered a report in which he recommended that the CAB approve the acquisition of such complete control of TWA by Toolco. The findings, conclusions and recommended decision of the Examiner were adopted by the CAB in an opinion and order dated October 6, 1950 (12 C. A. B. 192). In his report the Examiner set forth in detail the financial and other assistance given to TWA by Toolco, particularly in connection with the acquisition and financing of flight equipment:

[350] ". . . TWA, with Toolco's aid, continued to expand its fleet of aircraft. The principal additions to its fleet in the years 1947 through 1949 were made possible through special credit arrangements with aircraft manufacturers and through borrowings from various banks.

The record shows that this equipment could not have been obtained without the financial assistance of Toolco. Of six Constellations acquired in 1947, four were financed largely from funds advanced by Toolco under the terms of the letter agreement of January 8 of that year. During 1948 previous outstanding purchase money obligations covering nine

Constellation airplanes were consolidated, with the aid of Toolco, with the financing of twelve new Constellations into a new chattel mortgage. In February 1949, TWA entered into a conditional sales agreement with Toolco for two Constellations. In August, 1949, TWA entered into a bank credit agreement to assist in financing twenty more Constellations. As a part of this latter agreement, Toolco agreed to guarantee that the net worth of the carrier would not be less than $20,000,000 as of December 31, 1949. By agreement dated February 2, 1950, TWA purchased six more Constellations under a conditional sales agreement with Toolco. The arrangements for the purchase of the airplanes covered by this sales agreement were entered into directly by Toolco to assist TWA in acquiring such airplanes. . . ." (Examiner's report, pp. 30-31.)

The Examiner also detailed the benefits to the public as well as to TWA of Toolco's interest in TWA, and found that only through the assistance of Toolco had TWA been saved from bankruptcy in the postwar period, and concluded:

". . . The continued interest of Toolco in TWA appears essential to the best interest of the carrier and the public. Accordingly, in the light of the record in this case and in recognition of the meaning of public interest as set forth in section 2 of the Act, the Examiner finds that the additional control acquired by Toolco as the result of the letter agreement of January 8, 1947, is consistent with the public interest." (Examiner's report, pp. 63-64).

10. The orders of the CAB specifically approved as not inconsistent with the public interest all transactions between TWA and Toolco with respect to the acquisition and financing of flight equipment.* Among the transactions or proposed transactions thus approved by order of the CAB were the following:

[351]

Order No.	Date	Subject Matter
E-2404	1/27/49	Sale by Toolco to TWA of 2 Lockheed Constellation aircraft
E-4160	5/12/50	Sale by Toolco to TWA of 6 Lockheed Constellation aircraft
E-5324	4/25/51	Financing by Toolco in favor of TWA of final installment on 4 new Lockheed Constellation aircraft under a conditional sales contract; implementation of stock agreements between TWA, Toolco and the Equitable Life Assurance Society of the United States for the purpose of raising additional equity capital for the purchase of a fleet of aircraft
E-8214	4/ 1/54	Sale by Toolco to TWA of 3 Lockheed Constellation aircraft
E-10300	5/17/56	Sale by Toolco to TWA of 8 Lockheed 1049-G Constellation aircraft and 25 Lockheed 1649-A aircraft
E-10871	12/18/56	Loan by Toolco to TWA of up to $10,000,000
E-11432	6/11/57	Additional control of TWA by Toolco through buying its pro rata share of $34,000,000 additional common stock of TWA being offered to its stockholders; $15,000,000 Revolving Credit to be furnished to TWA by Toolco
E-13334	12/30/58	Sublease by TWA from Toolco of 4 L 1049-H Lockheed aircraft; guaranteeing of certain obligations of TWA by Toolco

*The orders approving acquisition of control are reported at 6 C. A. B. 153 (1944) and 12 C. A. B. 192 (1950).

Order No.	Date	Subject Matter
E-13542	2/26/59	Lease of Boeing 707-131 jet aircraft by Toolco to TWA
E-13873	5/15/59	Lease of up to 11 Boeing 707-131 jet aircraft by Toolco to TWA
E-14169	7/ 1/59	Extension of leases approved by Order No. E-13873, and lease of 4 additional Boeing 707-131 jet aircraft by Toolco to TWA
E-14504	7/30/59	Extension of leases approved by Order No. E-14169
E-14877	1/29/60	Lease of 8 Boeing 707-331 jet aircraft and 8 Convair 880 jet aircraft
[352]		
E-15430	6/23/60	Proposed financing and purchase of 25 Boeing 707 aircraft and 20 Convair 880 aircraft
E-15561	7/21/60	Purchase of 2 additional Boeing 707 aircraft by TWA from Toolco

Quite obviously, to the extent that Toolco, in the exercise of control approved by the CAB, determined that TWA's flight equipment should be acquired from a particular manufacturer or supplier or financed in a particular way, TWA was precluded from acquiring other flight equipment or financing the acquisition thereof in some other way.

11. The only act alleged in the complaint with respect to the period prior to 1961 which was not specifically approved by the CAB was a proposal that Northeast Airlines, Inc. (hereinafter "Northeast") be merged with and into TWA on allegedly unfavorable terms. As the CAB recognized in 1948 in ordering a hearing to determine whether the acquisition of further control by Toolco over TWA was in the public interest, the proposal of a merger is within the prerogatives of a 78% stockholder. Moreover, plaintiff's allegations with respect to the proposed merger are

without foundation and fail to state the basis of a cause of action under the anti-trust laws:

(a) The proposed merger, if approved by the Board of TWA and subsequently approved by the stockholders of Northeast and TWA, was specifically conditioned upon the approval of the CAB under the applicable provisions of the Federal Aviation Act, including Section 408 thereof;

(b) The effectiveness of the merger was also specifically conditioned upon approval by a majority of the stockholders of TWA other [353] than Toolco voting at a meeting called to approve such merger; and

(c) The desirability of a merger between TWA and Northeast has been fully recognized and acknowledged by the present management of TWA in a proceeding (Docket No. 12285) now pending before the CAB which was initiated by Northeast for renewal of authority to serve points south of New York. TWA, through its present management, intervened in said proceedings and on July 6, 1961, within a week after the commencement of this action, filed a statement with the CAB setting forth its position as follows:

> "Northeast's authority south of New York should be renewed as part of a merged operation and *TWA is the only logical candidate for such a merger.*"
>
> (Emphasis supplied.)

The proposed merger agreement is annexed hereto as Exhibit "A" and a copy of the letter by TWA to the CAB of July 6, 1961 is annexed hereto as Exhibit "B".

Affidavit of Raymond M. Holliday, August 7, 1961

THE POSITIONS TAKEN BY TOOLCO SINCE DECEMBER 31, 1960

12. In December 1960, in order to assist the financing by TWA of its jet equipment program, Toolco, at the insistence of certain lending institutions, placed its 78% stock interest in TWA in the Voting Trust referred to in the complaint under an arrangement by which a majority of the Voting Trustees would be named by the lending institutions supplying such financing. Under this arrangement The Equitable Life Assurance Society of the United States ("Equitable") and Metropolitan Life Insurance Company ("Metropolitan"), as the holders of a majority of certain notes of TWA, have the power to remove the majority of the [354] Voting Trustees, without cause, and designate their successors. The agreement dated as of December 1, 1960 among Irving Trust Company, Equitable and Metropolitan provides:

> "The Notes Agent [(Irving Trust Company)] shall take such action under Article Twelfth of the Voting Trust Agreement to remove either of the two Voting Trustees selected and appointed in accordance with § 2 of this Agreement (and any successor to either of such Voting Trustees) or to fill a vacancy in the office of a Voting Trustee appointed by the Notes Agent only if and whenever it shall be directed to do so by a majority of the Noteholders. Any such direction shall specify the action which the Notes Agent is thereby directed to take. . . ."

Under the by-laws of TWA, a majority of the Voting Trustees (having the power to vote a majority of the

stock) have the power to remove directors of TWA. Since the date of said Voting Trust the Board of Directors of TWA has been reconstituted by action of the Voting Trustees. Accordingly Toolco has been required to look to those now in control of TWA for the protection of its equitable interest in TWA.

13. It is inconceivable that Toolco, which has an equity interest in excess of $150,000,000 in TWA, including debts in an amount in excess of $75,000,000, would maliciously and willfully interfere with TWA's business. It has not done so. Rather, it has acted on the advice of counsel to take steps which its counsel advised were required to protect its equitable rights arising from its ownership interest in TWA.

14. On May 18, 1961 Toolco learned for the first time through an amendment to the Registration Statement of TWA which had theretofore been filed with the Securities and [355] Exchange Commission, but which had not yet become effective, that the lending institutions in control of TWA were proposing to lend to TWA on a long term basis $147,000,000 to finance the acquisition of Boeing jet equipment and that such borrowing would include a provision which would permit the holders of such additional debt to demand immediate payment in the event that the Voting Trust Agreement should terminate. The practical effect of any such provision would be to prevent the termination of the Voting Trust in accordance with the terms of the Voting Trust Agreement and to extend the Voting Trust until 1977, the term of the new proposed borrowing, and beyond the term agreed to with Toolco in connection with

the 1960 financing. Since the additional borrowings were being negotiated with financial institutions having the power to control TWA, Toolco through its counsel and upon his advice called the attention of those in control of TWA to the self-dealing inherent in said proposed financing and in any attempt to prevent the termination of the Voting Trust in accordance with its terms or to perpetuate the control of said lending institutions over TWA.

15. TWA repeatedly refused to give to me, even though I was a Director of TWA, or to Toolco, any of the details of TWA's proposed additional borrowings. For example, on June 1, 1961, I requested by telegram that I be informed as to the exact status of said financing. A copy of said telegram is annexed hereto as Exhibit "C". This telegraphic request was ignored by TWA and neither I nor Toolco was advised as to the details of said financing until after the filing of the complaint herein.

[356] 16. I do not understand how calling to the attention of lending institutions in control of TWA the possible self-dealing in lending large additional sums under terms by which they would perpetuate their control can be claimed to constitute a malicious and willful interference with the business of TWA.

17. Another of Toolco's alleged activities since 1960 which the complaint claims constituted willful and malicious interference with the business of TWA is an alleged attempt to coerce TWA into purchasing certain Convair equipment from Toolco. Toolco has always believed that TWA should be equipped with the most modern available

equipment and believes that such Convair equipment would be better suited to certain needs of TWA than other available equipment. It has not, however, sought to force said equipment on TWA as is demonstrated by the following proposals made in June 1961 by Toolco to TWA, the Voting Trustees and the lending institutions who now control TWA:

(a) By letter of June 10, 1961, a copy of which is annexed hereto as Exhibit "D", Toolco made three proposals in an effort to arrive at a solution to the need of TWA for additional jet equipment, the financing thereof and the interest of Toolco with respect thereto. Two of said proposals related to Convair equipment. As stated in said letter, TWA was given the opportunity to accept any one or any two or all three of said proposals.

(b) The first of said proposals was an offer by Toolco to guarantee subscription by the stockholders of TWA to an offering of $100,000,000 of additional equity securities in order to provide needed financing. Toolco expressly stated [357] in said letter that it was not a condition of said proposal "that TWA acquire, to supplement its fleet of jet aircraft, either Boeing aircraft, Convair aircraft, or any combination thereof or any other type of aircraft."

(c) The aforesaid proposal was conditioned solely upon the termination of the Voting Trust with respect to shares of common stock of TWA owned by Toolco. Toolco, however, stated in said letter that it was not its intention to change the present management of TWA and that if the proposal were accepted, Toolco would agree to the continuance of the "management

clause" of a certain mortgage indenture of December, 1960, which would protect the lending institutions with respect to any change which they might deem to adversely affect their interest in the management of TWA upon the termination of the Voting Trust. This provision states:

> "If a change of management of the Company shall occur which a majority of the Noteholders shall consider materially adverse to their interests as such Noteholders (the adverse effect of which change of management shall be conclusively established, for all purposes of this Indenture, by the giving of the notice hereinafter referred to), and a majority of the Noteholders shall give written notice to that effect to the Company and the Trustee, the Company will, within 90 days after receipt of such written notice from such Noteholders, effect or cause to be effected such a further change of management of the Company as shall be satisfactory to such Noteholders. . . ."

The proposal of Toolco to guarantee subscription of $100,000,000 additional equity capital, as well as the other two proposals made in its said letter of June 10, 1961, which did relate to Convair equipment was not accepted by TWA.

[358] 18. As is shown by exhibits attached to the affidavit of Chester C. Davis which I am informed will be submitted, the other assertions made by TWA in its complaint as to the activities of Toolco subsequent to 1960 are equally groundless. I do not understand how the assertions

in good faith by Toolco of positions which vitally affect its interest in TWA can constitute malicious and willful interference with the business of TWA.

19. For the reasons heretofore stated, it is respectfully submitted that the motion of defendant Toolco to dismiss the complaint herein should be granted.

(Sworn to by Raymond M. Holliday on August 7, 1961.)

Toolco's Notice It Is Conducting Depositions, February 15, 1962

[928]

[CAPTION]

BEFORE THE SPECIAL MASTER

SIRS:

PLEASE TAKE NOTICE that pursuant to the direction of the Special Master herein you are hereby advised that defendant Hughes Tool Company is presently conducting the deposition of the plaintiff, Trans World Airlines, Inc., by its president, Charles C. Tillinghast, Jr., and that it will thereafter depose Trans World Airlines, Inc. by Messrs. R. W. Rummel, E. O. Cocke and A. V. Leslie, and that it will thereafter depose Charles Thomas, Bank of America by Keith Carver and Robert Gordon, Bankers Trust Company by E. F. Ebert, Morgan Guaranty Trust Company of New York by John Schroeder, The Mellon Bank by Frederick Gwinner and Ralph [929] Ehler, Ben-Fleming Sessel, Robert A. Kerr and Irving Trust Company by Ben-Fleming Sessel and Robert A. Kerr, Frederic H. Brandi, Arthur L. Wadsworth and Dillon, Read & Co. Inc. by Frederic H. Brandi and Arthur L. Wadsworth, James F. Oates, Jr., Grant Keehn and The Equitable Life Assurance Society of the United States by James F. Oates, Jr. and Grant Keehn, Warner Mendel, Harry C. Hagerty, Gordon P. Jenkins and Metropolitan Life Insurance Company by Harry C. Hagerty and Gordon P. Jenkins, Irving S. Olds, Ernest R. Breech, Boeing Company by William M. Allen and J. O. Yeasting, and The Prudential Insurance Company of America by Monroe Chappelear.

Toolco's Notice It Is Conducting Depositions, February 15, 1962

Said examinations are currently being held at 120 Broadway (Room 3111), New York, N. Y. Information with respect to the time and place of the depositions may be obtained from the undersigned or from the Special Master, J. Lee Rankin, Esq., 36 West 44th Street, New York, N. Y.

Dated: February 15, 1962
New York, N. Y.

Yours, etc.,

CHESTER C. DAVIS, ESQ.,
Attorney for Defendant
Hughes Tool Company.
120 Broadway.
New York 5, N. Y.

[1225]

Pretrial Order, May 10, 1962

[CAPTION]

[APPEARANCES:]

* * *

[1226] Counsel for plaintiff Trans World Airlines, Inc. and defendant Hughes Tool Company requested in written communications to the Court that the compensation of the Special Master previously fixed by order of this Court dated February 7th, 1962 be increased, and that the payment of compensation to the Special Master be re-allocated, since additional parties were brought into the litigation after February 7th.

A conference of court and counsel was held on May 7th, 1962, and after hearing argument by the corporate parties, it is

ORDERED that paragraph V of the order of this Court dated February 7th, 1962 is amended to fix the compensation of the Special Master at $75.00 an hour commencing May 1st, 1962, and it is further

ORDERED that said paragraph V of the order of February 7th, 1962 is further amended to provide that the compensation of the Special Master is to be paid at monthly intervals, pending the taxation of costs, and that such monthly payments shall be apportioned equally among the following parties, Trans World Airlines, Inc., Hughes Tool Company, The Equitable Life Assurance Society of the

Pretrial Order, May 10, 1962

United States, Metropolitan Life Insurance Company, Irving Trust Company, and Dillon, Read & Co. Inc., effective with the compensation due for the month of March, 1962.

Dated: New York, New York
May 10, 1962

CHARLES M. METZNER
U.S.D.J.

[24551]

Pretrial Hearing, May 7, 1962

[CAPTION]

Before:

HON. CHARLES M. METZNER,
District Judge

* * *

[24552] [APPEARANCES:]

[24553] The Clerk: Trans World Airlines, Inc. v. Howard R. Hughes, Hughes Tool Company, et al.

The Court: The reason I called the conference this morning is that we have an open question regarding the compensation of the Special Master. His compensation was originally fixed by me at a conference of the attorneys for plaintiff TWA and defendant Howard Hughes Tool Company.

At that time his compensation was fixed at $60 an hour, to be divided evenly between the plaintiff and the defendant. Since that time four additional corporate defendants have been added as additional parties defendants and four individual additional parties defendants have been added.

I have received communications both from the plaintiff and the defendant indicating that they felt that the compensation fixed for the Special Master should be increased and, secondly, that the division of the compensation between the parties be fixed by the Court.

I had suggested that counsel get together and arrange this matter between themselves, but it seems that they have been unable to do so. So I would like to hear from the

parties as to their feelings [24554] both as to what the compensation should be of the Special Master and its allocation among the various parties.

Miss Lea, I see they have you sitting alone, so why don't we start with you.

Miss Lea: All right. In so far as the amount of the Special Master's compensation is concerned, your Honor, I believe that Tool has suggested that the amount be revised to something in between $75 and $100 per hour. The exact amount within that range is something which we would be perfectly willing to leave to your Honor's discretion.

In view of all the circumstances, in view of whatever it is that is allocated in similar circumstances, we would have no objection to any figure within that range. In so far as the allocation among the parties is concerned, we believe that the fairest way in which to divide this is to allocate a portion to each corporate defendant.

Since there are now six corporate defendants in the case, we believe it would be fairest to require each corporate defendant to pay one-sixth of the total cost of the Special Master's compensation.

This would permit of a reasonable and fair [24555] distribution. At this time whatever amounts are paid, are, of course, subject to your Honor's order, distributable or redistributable at the termination of the case as costs and as an interim measure it seems to us most fair to require each corporate defendant to bear one-sixth, and that is what we suggest.

* * *

[1486]

TWA's Notice of Taking Deposition of Hughes, dated August 16, 1962

[CAPTION]

SIRS:

PLEASE TAKE NOTICE that plaintiff will take, in the above-entitled action, the deposition, as a witness, of Howard R. Hughes, of Beverly Hills Hotel, Los Angeles, California, at the United States District Courthouse for the Southern District of California, Los Angeles, California, on the 24th day of September, 1962, at 10:00 A. M. or at such other time or place as may be fixed by order of the Court or by agreement herein, upon oral examination pursuant to the Federal Rules of Civil Procedure before a Notary Public or before some other officer authorized by law to administer oaths. The oral examination will continue from day to day until completed. You are invited to attend and cross-examine.

Dated: New York, New York
August 16, 1962.

Yours, etc.

CAHILL, GORDON, REINDEL & OHL

By /s/ ROBERT G. ZELLER
A Member of the Firm

Attorneys for Plaintiff
Trans World Airlines, Inc.
80 Pine Street
New York 5, New York

[1740]

Affidavit of John F. Sonnett, September 6, 1962

[CAPTION]

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

JOHN F. SONNETT, being duly sworn, deposes and says:

1. I am a member of the firm of Cahill, Gordon, Reindel & Ohl, counsel for Trans World Airlines, Inc. ("TWA") and am familiar with the proceedings had in this matter.

2. This affidavit and the accompanying affidavits of Charles Andrew Appel, Jr. and Robert G. Zeller are submitted in reply to the affidavit of Chester C. Davis sworn to September 5, 1962, and in support of the motion of Trans World Airlines, Inc. to strike the answer of Toolco, to dismiss its counterclaims and to render default judgment for plaintiff.

3. The prior record in this proceeding, with which the Court is fully familiar, establishes that the default of Hughes Tool Company in answering the interrogatories concerning the whereabouts of Howard R. Hughes was wilful, deliberate and inexcusable. In the Court's letter [1741] of August 21, 1962, with which the Court returned to counsel for Hughes Tool Company a photocopy of an alleged "authorization from Mr. Hughes to accept service on his behalf" the Court stated in part "in the circumstances, I will expect that you will comply with the order of the Court of July 26, 1962."

Affidavit of John F. Sonnett, September 6, 1962

4. Despite the prior orders of this Court and the final explicit direction again in the Court's letter of August 21, 1962, Hughes Tool Company chose to persist in its contention that it was under no duty to comply with any Court order in this regard because Howard R. Hughes had allegedly authorized Chester C. Davis to accept service. Accordingly, the interrogatories were not answered.

5. This record of wilful and deliberate flouting of specific and unambiguous orders of this Court alone warrants the dismissal of Hughes Tool Company's pleadings and the entry of default judgment in favor of Trans World Airlines, Inc. The contempt for Court orders demonstrated by Hughes Tool Company in this situation is more grave than that in the Friedman case in which Judge Sugarman recently granted a default judgment for over $12,000,000.

6. There is, however, a further and much more serious contempt of court on the part of Hughes Tool Company. This contempt, which has just been discovered by Trans World Airlines, Inc., consists of the deliberate submission by Hughes Tool Company to the Court of a forged and fraudulent document designed to mislead the Court and Trans World Airlines, Inc. with respect to the so-called "authorization" to accept service.

[1742] 7. From the affidavits annexed, particularly that of Mr. Charles Andrew Appel, Jr., a leading expert on the subject of questioned documents, it is apparent beyond doubt that the writing on the so-called "authorization" purporting to be that of "Howard R. Hughes" is a forgery and that some person acting on behalf of Hughes Tool Company signed this document which was then represented to the Court to contain the signature of Mr. Hughes.

8. Under these circumstances, it can only be concluded that Hughes Tool Company not only wilfully and deliberately refused to comply with Court orders, but in its effort to conceal the whereabouts of Howard R. Hughes deliberately chose to attempt to work a fraud on this Court. The present record alone, therefore, we submit, fully justifies, and indeed requires, granting plaintiff's motion. Should the Court have the slightest doubt, in the circumstances, it would seem appropriate for the Court to direct the immediate appearance before the Court of all persons who had any connection with the forged authorization so that their testimony may be taken under oath. If this were done, the Court might see fit to conclude that in addition to striking the answer of Hughes Tool Company, other additional sanctions with respect to the guilty individuals would be appropriate.

(Sworn to by John F. Sonnett, on September 6, 1962.)

[1743]

Affidavit of Charles Andrew Appel, Jr.,
September 5, 1962

[CAPTION]

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

CHARLES ANDREW APPEL, JR., being duly sworn, deposes and says:

1. I am an Examiner of Questioned Documents in civil cases, which includes the identification of handwriting, typewriting and other mechanical impressions, paper, ink and writing materials; and determination of the authenticity of writings.

2. I have been engaged in this work since 1924. I was appointed a Special Agent of the Federal Bureau of Investigation in 1924, made a special study of Questioned Documents and, after becoming proficient in this work was assigned to set up a laboratory and analyze papers in F.B.I. cases. The F.B.I. Laboratory was established in 1932 and from then until my retirement December 31, 1948, I was regularly assigned the examinations of specimens in Criminal cases. Upon retiring at the end of 1948 I set up my own laboratory and have been engaged in the examination of civil cases.

[1744] 3. My training is as follows: LL.B. Georgetown University 1922. Admitted to the bars of the District of Columbia 1922 and to practice before the U. S. Supreme Court 1929.

Affidavit of Charles Andrew Appel, Jr., September 5, 1962

Studied the literature on Document Analysis and the application of scientific procedures to investigations, attended lectures of such examiners as J. Fordyce Wood at Northwestern University in Chicago, Albert S. Osborn of New York, and Dr. Wilmer Souder, National Bureau of Standards, Washington, D. C.; conducted research to develop methods of analysis and instructions for investigators and examiners, lectured to schools of Special Agents, to examiners, and to the National Police Academy, and prepared texts used in F. B. I. work.

4. I have qualified as a witness to give testimony as a Document Examiner in Federal, State and Military Courts throughout the United States and possessions, and before Committees, Commissions, and Congress.

5. Among the well known cases to which I have been assigned an Examiner of Questioned Documents have been:

R. Hauptmann, Kidnaping, Bronx, N. Y.
Manny Strewl et al, Kidnaping, Binghamton, N. Y.
Duquesne espionage conspiracy, German, New York.
Ludwig espionage conspiracy, German, New York.
Velva Lee Dickinson, espionage, Japanese, New York.
Marine Welding Co., War Frauds, Philadelphia.
Many murder, extortion, and forgery cases in State and Federal Courts, Terre Haute, Salt Lake, Richmond, Memphis, Birmingham, Los Angeles, etc.
The so-called Pendergast Election Fraud Prosecutions at Kansas City.
Harry Publiker and Vincent Astor Will Suits, Chester, Pennsylvania and New York.
[1745] Gurmani v. Suleri trial at Lahore, Pakistan, concerning the Kashmir Acquisition.

Affidavit of Charles Andrew Appel, Jr., September 5, 1962

Aristotle Onassis v. Saudi Arabia.

6. Annexed hereto as Exhibit A1, A2 and A3 are photocopies which have been supplied to me by counsel for TWA and represented to me to contain the signature of "Howard R. Hughes."

7. Annexed hereto and marked Exhibit B is a photocopy signature which has been shown to me and described to me as the "questioned document."

8. Enlargements of the above are annexed as Exhibit C.

9. An initial analysis was made of the reproductions for evidence that they are or are not accurate within the needs of the examination. It was found that fine details are reproduced in the lines showing variations of width and of pen pressure. No essential lines are obscured by increase of contrast or other effect. For these reasons it was concluded that the reproductions are accurate copies of the originals and adequate for the analysis.

10. I have compared the writing appearing on Exhibit B with the writings appearing on Exhibit A1, A2 and A3 and was able to form an opinion as to whether or not these signatures were written by the same person. I have concluded that the signatures shown on Exhibit A1, A2 and A3 were written by the same person, but the signature appearing on Exhibit B was written by a different person.

11. The reasons for my conclusions as above [1746] stated are as follows: As shown in Exhibit A1, A2 and A3.

this writer modifies the shape of letter forms from conventional copybook designs to accommodate with his own personal habits of motion. In this way the left side of "H" is curved and the right side is a straight line from which the pen moves up to the left and reverses direction to make the cross mark with a small loop and a counter-clockwise motion.

In Exhibit B the right side of the "H" curves and at the end the pen moves to the left with only a small curve and then directly to the right with no loop, a motion which is clockwise and contrary in direction to that habitual to the writer of Exhibit A1, A2 and A3. The general resemblance in shape of the "H" of Exhibit B with that of Exhibit A1, A2 and A3 is superficial and due to the curving of the left side which does not however conform to the shape habitual to the writer in his examples.

In the same way throughout the signature which is questioned, Exhibit B, letter designs differ in detail from Exhibit A1, A2 and A3 because of the use of pen movements which are not the same. The general over-all design does have a superficial resemblance.

Because of this superficial resmblance, while details differ, it can only be true that the questioned signature of Exhibit B was written by another person than the writer of Exhibit A1, A2 and A3 during an attempt to reproduce the same design in which there was failure because the automatic habitual pen movements were not made.

Evidence consisting of such differences may be [1747] further illustrated with the "o" in "Howard" which in the questioned signature begins higher and ends lower than it should, the whole "o" being aligned with the following "w" instead of spaced above it. The "w" in the questioned signature is aligned horizontally and does not slant from

the left to right, a slant which is habitual in the writer of Exhibit A1, A2 and A3. The "a" in the questioned signature is too narrow, it being the habit of the writer of Exhibit A1, A2 and A3 to begin the "a" from the bottom and round it completely. The modification of letter designs by different individuals in different forms comes about through the coordination of muscles by which one method of moving is easier and more accomplished in a direction than in the direction used by someone else. There is, however, tendency of different people when speeding writing motions to achieve in general somewhat similar results; "a" for instance generally tending to become higher and more narrow as speed is increased, which is the result seen in the questioned Exhibit B in the "a" and the "o". The writer of Exhibit A1, A2 and A3 signatures, with regard to the small "a", prefers an automatic circular motion to gain speed at this point so that the letter is more circular and larger than in copybooks or in writings of other persons.

In the questioned signature, Exhibit B, the "r" has a flat top, only slightly rounded, whereas in the example Exhibit A1, A2 and A3, greater modification occurred so that the horizontal upper part of the "r" has become an arch.

In the same way the small "d" in the questioned [1748] signature is very much higher in the loop, which is as high as capital letters, entirely different from the examples in Exhibit A1, A2 and A3, and the ending extends a longer distance to the right.

The capital initial "R" in the Exhibit A1, A2 and A3, shows contrary motion to that of the questioned "R" in Exhibit B, in the same way that contrary motion appeared

in the "h". In the questioned Exhibit B the motion is circular from the left to right or clockwise; whereas in the Exhibit A1, A2 and A3, a straight line is drawn which is retraced in curving up to the left so as to make a counter-clockwise loop before moving to the right side of the arm. These motions are distinctly contrary in direction, yet in both instances the shapes are modified in the way that they would be modified because of speed and automatic motion. The writer of Exhibit B inadvertently was unable to follow the form of the signature as appears in Exhibit A1, A2 and A3.

A particularly good example of the discrepancy in writing motion habits displayed is the small "g" which in the questioned Exhibit B resembles the figure "8" because the upper circular form is abbreviated by rounded curves in order to save time. In the examples Exhibit A1, A2 and A3 it will be seen that in making the small "g", after lifting the pen in completing the "u", the point is replaced on the paper a considerable distance to the right and is then moved in a very large arc to the left and down to form the lower loop and the upper loop of the "g" is completed from the lower loop by extending the line up into the "h". The resulting shapes [1749] are completely different from the questioned "g".

Small "h" in Exhibit A1, A2 and A3 is retraced at the top and at the bottom counter-clockwise motion produces a "u" shape in place of the arch which completes the "h". Contrary to this there is a loop in the "h" of Exhibit B and an arch at the end. The proportions of one part to another are completely different and the direction of motion differs. These modifications are caused by automatic movement tendencies of two different writers.

Affidavit of Charles Andrew Appel, Jr., September 5, 1962

At the end of the last name in Exhibit B the final line is extended to the right as the pen is lifted. Lines of this type appear in Exhibit A1, A2 and A3 but the Exhibit A1, A2 and A3 finishing lines are an extension of modified "s" forms quite different from Exhibit B which is not so rounded or spread out because of the speedy movement of the pen.

The alignment of the last name in Exhibit B is completely different from that of the examples in Exhibit A1, A2 and A3 and this does not exist alone because of a difference in speed. In other words, the questioned signature in Exhibit B is not simply written more slowly or formally, instead being constructed by movements which do not modify the design in the same manner even though they are as speedy or speedier.

For these reasons it is clear that the questioned signature of Exhibit B was written by another writer than the person who wrote Exhibit A1, A2 and A3.

(Sworn to by Charles Andrew Appel, Jr., on September 5, 1962.)

[1908]

Pretrial Order, September 21, 1962

[CAPTION]

A pretrial conference was held on September 19th, 1962 upon a notice from the attorneys for the plaintiff that it was appealing from so much of the Special Master's ruling of September 15th, 1962 as denied the plaintiff the right to proceed with the deposition of Howard R. Hughes on September 24th, 1962. After hearing counsel for the plaintiff, the defendant Hughes Tool Company and the additional defendants, and after reading the transcript of the hearing before the Special Master on September 15th, 1962, the appeal is disposed of as follows.

[1909] Sometime prior to July 12th, 1962 the Special Master evidenced his serious concern about whether or not Howard R. Hughes would be available as a witness in this proceeding if and when his deposition was properly reached under the orders of the court. This concern of the Special Master was not aroused in connection with any application by the plaintiff to interfere with the priority of deposition previously determined by order of the court dated February 7th, 1962 as amended by the order of March 5th, 1962. In order to resolve that problem prior to the time of requesting Howard R. Hughes to appear as a witness, the Special Master afforded the Tool Company alternative procedures. Either it was to answer certain interrogatories as to the whereabouts of Howard R. Hughes, in order to facilitate the service of a witness subpoena, or counsel for the Tool Company was to provide satisfactory proof that he was authorized to accept service of the subpoena on behalf of Howard R. Hughes.

Interrogatories were framed by the plaintiff and served upon the Tool Company which thereafter were amended by order of the court dated July 12th, 1962. Subsequently, by order dated July 26th, 1962, the time for the Tool Company to answer the interrogatories was fixed for August 27th, 1962. Counsel for the Tool Company then served and filed with the court a document which he asserted gave him the authority to accept service of the witness subpoena on behalf of Howard R. Hughes. At this time the court reserves for future determination any question raised by the plaintiff regarding the authenticity of that document.

[1910] Pursuant to the document filed with the court, Chester C. Davis, counsel for the Tool Company, accepted service of a witness subpoena on behalf of Howard R. Hughes on September 6th, 1962. That subpoena was issued out of the United States District Court for the Southern District of California upon the notice by the attorneys for the plaintiff served upon Chester C. Davis, which stated that the deposition of Howard R. Hughes as a witness would be taken at the United States District Courthouse for the Southern District of California in Los Angeles on September 24th, 1962. The return of the marshal, indicating service upon Chester C. Davis in Los Angeles, was accompanied by an affidavit by Mr. Davis stating that he had been authorized in writing by Howard R. Hughes to accept such service.

Pursuant to the order of the court dated July 12th, 1962 and the suggestion made by the court at a hearing held on September 6th, 1962, the plaintiff moved before the Special Master on September 15th, 1962 for permission to suspend the taking of the depositions by the Tool Company in order to permit plaintiff to commence taking the deposition of

Howard R. Hughes on September 24th, 1962, and that the suspension of the taking of depositions by the Tool Company be continued until the deposition of Howard R. Hughes was completed. The Special Master denied the application of the plaintiff.

[1911] However, in connection with this denial the Special Master directed Chester C. Davis to write to Howard R. Hughes and inform him that the Special Master considered that the subpoena is binding upon Mr. Hughes and that he is subject to appear pursuant to that subpoena on September 24th, 1962 or at any other date fixed by the court. The Special Master stated for reasons set forth in the record that unless Howard R. Hughes communicated with him by today, Friday, September 21st, 1962 he would consider that Mr. Hughes has acquiesced in this interpretation and that if Mr. Hughes subsequently either attacked the validity of the subpoena or failed to appear pursuant to that subpoena on September 24th, 1962, or at any future time that the court might direct for the taking of the deposition of Mr. Hughes pursuant to that subpoena, he, the Special Master, would consider the imposition of sanctions upon the Tool Company, and that he would entertain a motion to strike the answer of the Tool Company and enter judgment against it.

Without passing upon the power of the Special Master to grant the entry of such judgment, the court adopts the interpretation and conditions expressed by the Special Master. Any determination by the Special Master on an application for a default judgment would, of course, be reviewable upon appeal to the court.

On the hearing of this appeal the court inquired of Chester C. Davis as to whether he had followed the di-

rections of the Special Master. Mr. Davis advised the [1912] court that he had written to Howard R. Hughes on Monday, September 17, 1962, and enclosed the pages of the transcript of the hearing before the Special Master on September 15th, 1962 which contained the views of the Special Master. Howard R. Hughes has neither communicated with the Special Master nor the court as of 5:30 p. m. today, which is the end of the business day. Therefore, I find that Mr. Hughes has acquiesced in the interpretation and conditions expressed by the Special Master.

The Special Master has presided over the deposition proceedings practically since their inception. The propriety of plaintiff's application is peculiarly within his competence. He is aware of the court's views contained in the last paragraph of the order of July 12th, 1962. Plaintiff has not made an adequate showing at this time that the ruling of the Special Master within this framework is in error. I approve and affirm the ruling of the Special Master denying the application of the plaintiff to proceed with the deposition of Howard R. Hughes on September 24th, 1962 to the extent that the return date of September 24th, 1962 contained in the subpoena served upon Howard R. Hughes is adjourned by order of this court to October 29th, 1962 at the same time and place. The Tool Company may apply to the Special Master on October 22nd, 1962 for a further adjournment of the date now fixed for the deposition of Howard R. Hughes.

[1913] Chester C. Davis is directed to notify Howard R. Hughes of this determination before 9 p.m. tonight, Eastern Daylight Time, both by telephonic communication

and by mailing a copy of this order air mail special delivery to Howard R. Hughes.

So ORDERED.

Dated: New York, N. Y.
September 21, 1962

/s/ CHARLES M. METZNER
U. S. D. J.

Affidavit of John F. Sonnett, September 14, 1962

[1765]

[CAPTION]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JOHN F. SONNETT, being duly sworn, deposes and says:

1. I am a member of the firm of Cahill, Gordon, Reindel & Ohl, counsel for Trans World Airlines, Inc. ("TWA"), and I am familiar with the proceedings had in this matter.

2. This affidavit and the accompanying exhibits are submitted in support of the motion of TWA for an order:

(a) that TWA may commence taking the deposition of Howard R. Hughes in New York on September 24, 1962 [1766] and continue such deposition from day to day until completed,

(b) directing that defendant Hughes Tool Company ("Toolco") produce Hughes at that time and place for the purposes of such deposition, and

(c) suspending the taking of depositions by Toolco from September 24, 1962 until the deposition of Hughes is completed.

and in reply to so much of the affidavit of Chester C. Davis sworn to September 13, 1962 (hereinafter the "Davis Affidavit") as purports to discuss the foregoing motion.

Affidavit of John F. Sonnett, September 14, 1962

3. The basis for TWA's request that it be permitted to go forward with the deposition of Hughes commencing September 24 has been made a matter of record in numerous prior proceedings before the Special Master and before the Court. Particularly pertinent is the hearing before the Court on September 6, 1962 on TWA's motion for the entry of a default judgment against Toolco based on Toolco's deliberate and wilful failure to answer interrogatories as to Hughes' whereabouts, and the proceedings in connection with TWA's earlier motion for an order that Rule 4 of the new Civil Rules of this Court should be applied in this case. TWA believes that the Court, on the entire record to date, has concluded that TWA should proceed with the depo- [1767] sition of Mr. Hughes on the 24th, and accordingly that no useful purpose would be served by repetition of the points which TWA has previously made.

4. A substantial part of the Davis Affidavit is devoted to an expression of Mr. Davis' views as to the merits of the present action. See, e.g., pages 4-6, 12-23. This is apparently set forth in the hope that it will lead the Special Master not only to postpone beyond September 24 the taking of Hughes' deposition, but, as well, to decide that the taking of that deposition or indeed any depositions by TWA could serve no useful purpose and therefore should not be allowed to transpire. The implied suggestion that an anti-trust plaintiff should be denied the right to develop its case through depositions of the adverse party's witnesses is patently absurd. Hence Mr. Davis' attempt to confuse the issue by fragmentary, incomplete and inaccurate discussion of the merits of this litigation should be ignored.

5. This affidavit is therefore concerned primarily with so much of TWA's pending motion as seeks an order directing Toolco to produce Hughes here in New York for his deposition. On September 6, 1962, counsel for Toolco (Mrs. Lea), in the argument on TWA's motion for the entry of a default judgment, advised the Court that the United States Marshal for the Southern District of California on that same day had served Mr. Hughes with a subpoena to testify as a witness in this case by delivering a copy of a subpoena to [1768] Mr. Chester Davis in Los Angeles who was authorized to accept that subpoena on Mr. Hughes' behalf.

6. The subpoena referred to was a subpoena issued by the United States District Court for the Southern District of California on August 17, 1962. At our request, a member of the firm of Gibson, Dunn & Crutcher, a law firm in Los Angeles which has acted for us in connection with this case, and which had assisted us in our unsuccessful efforts to serve Mr. Hughes personally at the Beverly Hills Hotel on August 17, 1962, ascertained from the local United States Marshal's office the circumstances of the service of that subpoena upon Mr. Chester Davis, as counsel for Hughes, on September 6. As is shown by the memorandum by the Gibson, Dunn partner, a copy of which is attached as Exhibit A, it is apparent that this service was an eleventh hour device contrived to avoid the consequences of Toolco's wilful refusal to comply with the Court's order directing Toolco to answer interrogatories as to Hughes' whereabouts.

7. The subpoena in question directs Hughes to appear and testify on September 24 at the Federal Court House in

Los Angeles. It was made returnable there to comply with the provisions of Rule 45, FRCP.

8. In addition, however, the record in this matter establishes that Howard R. Hughes throughout has been and is at least the "managing agent" of Hughes Tool Company.

[1769] 9. Before discussing some of the matters showing that Hughes has been and is at least a managing agent of Toolco, it should be pointed out that Judge Metzner ruled on September 6, 1962 that the question whether effective service had been made upon Hughes was to be dealt with separately from the question whether a fraud had been sought to be perpetrated on the court through submission of an "authorization" purporting to bear Howard R. Hughes' signature which did not in fact bear Howard R. Hughes' signature (Tr. 11-12, 14-15). The first question, the Court pointed out, could best be answered by whether Mr. Hughes showed up in response to the subpoena on September 24th. It was in this connection that he suggested the filing of TWA's instant motion. Despite Judge Metzner's ruling that the two questions are to be treated separately, the Davis Affidavit lumps both matters together. The equivocal and evasive way in which the forgery is sought to be dealt with in the Davis Affidavit accordingly is the subject of a separate affidavit by me to be filed directly with the Court on September 17th as directed. A copy is hereto annexed as Exhibit B.

10. Some of the evidence in this matter which establishes that Hughes was and is at least the managing agent of Hughes Tool Company, is hereinafter discussed. It consists of:

Affidavit of John F. Sonnett, September 14, 1962

A. Sworn statements of Holliday in CAB proceedings relative to Northeast Airlines;

[1770] B. Communications which passed through the Hughes Communications Center at Romaine Street in Los Angeles in 1961, and which communications were produced to the CAB; and

C. Various documents produced in this case from the Communications Center at Romaine Street.

SWORN STATEMENTS OF HOLLIDAY IN THE CAB PROCEEDINGS

11. From April 2d until approximately April 20, 1962, the Civil Aeronautics Board conducted hearings in Washington, D. C. in the matter of the "Toolco-Northeast Control Case", Docket No. 11620. In those hearings Toolco sought approval of certain transactions which would place it in control of Northeast Airlines. Mr. Raymond M. Holliday, a defendant in this proceeding, was called as a witness on behalf of Toolco.

12. In his written direct testimony Mr. Holliday stated "I am executive vice president, secretary and the chief financial officer of Hughes Tool Company". (Direct testimony of Raymond M. Holliday). In addition, Mr. Holliday stated that he was a member of the Board of Directors and of the Executive Committee of Toolco (Tr. 781) and,

> "Q. Am I to understand that you control the Tool company?
>
> "A. No, I don't control the Tool company, no. It is controlled by a stockholder, Mr. Hughes." (Tr. 784).

Affidavit of John F. Sonnett, September 14, 1962

[1771] 13. The hearing before the Civil Aeronautics Board established that the decision to acquire control of Northeast Airlines was made personally by Mr. Hughes, and that the decision was made in 1961.

> "Q. Let me ask you this, Mr. Holliday. I believe you previously testified that the policy determinations by the Tool company to acquire Northeast were made by Mr. Hughes sometime in October of 1961?
>
> "A. I don't think I said the precise time. It was in the early fall or middle summer. I don't think I testified to the time." (Tr. 1107).

Mr. Holliday then stated:

> "A. Maybe this would clear this up. I remember when Mr. Stretch—well, he talked with Mr. Davis about this. Mr. Davis said is this something we can do or the Tool company can do without consulting Mr. Hughes? I said it is something I don't think the Tool company would do without consulting Mr. Hughes, and he was later consulted." (Tr. 1108)

14. The transcript of that hearing also shows that Toolco finally agreed to pay Atlas $5,000,000 for its position in Northeast. On that subject the following took place during Mr. Holliday's cross-examination:

> "A. . . . We reported the $5 million figure to Mr. Hughes, however.
>
> "Q. Who reported that? Was that you?
>
> "A. I believe it was Mr. Davis and Mr. Cook, I don't know which one.

"Q. Mr. Hughes said that was all right?

"A. I don't know whether he said it is all right. He certainly did not veto it. If he had vetoed it we would not have had the agreement." (Tr. 1206).

[1772] DOCUMENTS PRODUCED TO THE CAB.

15. The CAB hearing established that during 1961 scores of communications concerning the Northeast merger flowed through the Toolco message center at 7000 Romaine Street, Los Angeles, California, to Mr. Hughes from Messrs. Davis and Cook or from Mr. Hughes to Messrs. Davis and Cook. Copies of several of these documents are attached hereto as Exhibit C. In this connection it is interesting to note that Mr. Davis was retained as Toolco's counsel directly by Mr. Hughes and not by the officers of Toolco (Tr. 1107). One of the communications between Toolco's counsel and Mr. Hughes was read in part into the CAB record by Mr. Cook during an executive session of the hearing, the transcript of which was later made public by the Civil Aeronautics Board. The text as read by Mr. Cook follows next and amply demonstrates that Mr. Hughes personally makes the important decisions for Toolco:

"MR. COOK: [Reading from Memo to Hughes] In my view it is impossible to apply to the situation the ordinary business standards for investment. Independently of other objectives, it is obvious that you would not invest funds in a bankruptcy enterprise.

"In an informal and confidential conference which we had with Bill Forrester, he pointed out in his opinion you can probably do better to pick

up the Airline in a Chapter 10 Bankruptcy where you would not be saddled with completed capitalization and threat of trade creditors. Forrester would even say that in the Florida Route Case Northeast would be stronger in a Chapter 10 Bankruptcy than under Hughes control.

"Nevertheless we are quite aware you do have other important objectives which we are not free to discuss with Forrester such as the following:

[1773] "(a), exploiting the CAB proceedings to restore public favor to you and to the Tool Company. To some extent this is already being achieved.

"(b), avoiding the possible adverse publicity of a Northeast lawsuit against the Tool Company in the event of a chapter 10 receivership.

"(c), protecting the favorable possibility of employing a Northeast package as frankly inflated piece of contribution with which to effectuate a TWA settlement,

"(d), the matter of finding a home for four 880's,

"(e), protecting or restoring value to the Tool Company's $9½ million investment in Northeast."

(Tr. Executive Sessions 234-235)

VARIOUS DOCUMENTS PRODUCED IN THIS CASE.

16. Documents produced in this litigation by Toolco likewise contain cogent evidence that Hughes was and is, by any test, at least a managing agent of Toolco. Particularly instructive are the so-called "call sheets" of Raymond

Holliday and other documents during the year 1960 and 1961. Copies of various of these are annexed as Exhibit D. Even the most casual perusal of the instructions transmitted by Hughes shows that Mr. Hughes is not merely consulted and advised as to Toolco developments but is in fact the one who makes the decisions and advises his subordinates of them.

[1774] 17. An interesting illustration of the absolute personal control which Hughes habitually exercises over Hughes Tool Company, and which he sought to exercise over TWA, is to be found in the call sheet appearing as the first document in Exhibit D annexed, a message from Hughes to William A. Forrester, Jr. It will be noted that Hughes instructed his communicator on October 28, 1960 to call Mr. Forrester

> ". . . and tell him that for his information that Charlie Thomas negotiated and developed the deal with Dillon Read financing plan without my authority or encouragement from me; he forced it down my throat then at a Board meeting at which time he created a coalition of my directors and turned them against me and faced me with a mass resignation of all but one of the TWA directors. I have never liked this plan; I have never been in favor of this plan; I have fought it from the very beginning and I am still fighting it and I assure you that if it is employed it will be over my dead body and if you would like to come up with any suggestions of an alternative plan or any way whatsoever by which I can avoid being forced into the Dillon Read program, I would be most grateful. It is very flattering for you to say that you don't think I have ever

> been forced to do anything and maybe there was a time when this might have been a fairly accurate statement, but I assure you it is not true today and has not been true concerning this Dillon Read program from its inception. I have fought it hammer and tong from the very first day that I ever heard of it."

18. As an illustration of the continued exercise of Hughes' absolute authority, despite his alleged resignation as president of Toolco, Mr. Holliday's call sheet for February 20, 1961, contained in Exhibit D, reveals long and detailed instructions from Hughes to Holliday regarding the handling of [1775] Toolco's Convair 990 order. Clearly these are the directions of one who is called upon to make the final decisions as to company affairs.

19. Buried in the text of the February 20th call sheet is the following illuminating statement by Hughes:

> "However I obtain TWA's acceptance to this is my own problem; most likely HTCO will control TWA when the matter comes up."

20. Although the above quoted testimony before the CAB and the document appended hereto by no means contain all of the evidence demonstrating that Hughes is Toolco's managing agent, they are sufficient to establish that fact beyond doubt. They show that Howard R. Hughes exercises absolute domination and control of all major decisions by Toolco in the field of commercial aviation. They compel agreement with the observation by the CAB's hearing examiner in the Toolco-Northeast control case that:

Affidavit of John F. Sonnett, September 14, 1962

". . . I think that we should quit kidding ourselves to believe that Toolco is some other entity besides Howard Hughes." (Tr. 1085).

(Sworn to by John F. Sonnett on September 14, 1962.)

Toolco's Notice of Motion, January 22, 1963

[CAPTION]

[2527]

SIRS:

PLEASE TAKE NOTICE that upon the motion of defendant Hughes Tool Company ("Toolco") to dismiss the complaint herein, the papers to be filed in support of said motion by Toolco as provided in the order of the Court dated January 19, 1963, and upon all proceedings herein, the undersigned will move before Honorable Charles M. Metzner, United States District Judge for the Southern District of New York, at such place as shall be fixed by him, on February 8, 1963 at 4:00 o'clock in the afternoon, or at such other time thereafter as shall be fixed by the Court, (1) for an order that the deposition of Howard R. Hughes shall not be taken in this action until after a final [2528] adjudication of the aforesaid motion to dismiss and (2) for such other and further relief as to the Court may seem just and proper.

Dated: New York, New York
January 22, 1963.

Yours, etc.,

CHESTER C. DAVIS, ESQ.
Attorney for Defendant
Hughes Tool Company
120 Broadway
New York 5, N. Y.

Reply of Additional Defendant The Equitable Life Assurance Society of the United States to Counterclaims. January 25, 1963

[2546]

[CAPTION]

Additional Defendant The Equitable Life Assurance Society of the United States ("Equitable"), for its reply to the purported counterclaims of defendant Hughes Tool Company ("Toolco") against Equitable:

WITH RESPECT TO THE FIRST COUNTERCLAIM

1. States that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of paragraph 42 thereof, except that Toolco is a Delaware corporation with its principal place of business in Houston, Texas, and all of its common [2547] stock is owned by Howard R. Hughes ("Hughes").

2. States that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of paragraph 43 thereof, except that (a) TWA is a Delaware corporation with executive offices in New York City; (b) TWA has been for a number of years a large domestic and international air carrier; (c) Toolco has for a number of years held a substantial stock interest in TWA, having acquired more than 78% of such stock prior to December, 1960; (d) Toolco in December, 1960 placed the shares of stock then held by it in a voting trust and since that time has held a beneficial interest in such shares; and (e) Toolco at various times between 1947 and 1960 nominated a majority of TWA's directors.

Reply of Additional Defendant The Equitable Life Assurance Society of the United States to Counterclaims, January 25, 1963

3. States that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of paragraph 44 thereof, except (a) admits the averments of the first sentence thereof; (b) admits that it and Metropolitan Life Insurance Company ("Metropolitan") are the country's third and first largest insurance companies, respectively, with admitted assets of over $10.5 billion and $18.7 billion, respectively; and (c) admits that from 1945 to the present it has held certain indebtedness of Trans World Airlines, Inc. ("TWA") and that since December, 1960 Metropolitan has also held certain such indebtedness.

4. States that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of paragraph 45 thereof, except (a) that Irving Trust Company ("Irving") is a New York [2548] trust company with a place of business in the City of New York, that it has been one of TWA's principal commercial bankers, and that it and other lending institutions have made loans to Toolco and TWA.

5. Denies each and every averment of paragraph 46 thereof, except (a) states that it is without knowledge or information sufficient to form a belief as to the truth of the averments relating to the citizenship of Ernest R. Breech ("Breech"); and (b) admits that Breech has been since on or about April 27, 1961 Chairman of the Board of Directors of TWA; that he was from December, 1960 until his resignation effective on or about January 26, 1962 one of two voting trustees selected by the noteholders, including

Reply of Additional Defendant The Equitable Life Assurance Society of the United States to Counter Claims, January 25, 1963

Metropolitan and Equitable, under a Noteholders' Agreement dated as of December 1, 1960, to which reference is made for the terms and provisions thereof; and that he was designated by the "Notes Agent" thereunder as a voting trustee under a Voting Trust Agreement dated as of December 15, 1960, to which reference is made for the terms and provisions thereof.

6. States that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of paragraphs 47 and 48 thereof, except (a) that Charles C. Tillinghast ("Tillinghast") has been President and chief executive officer of TWA since on or about April 17, 1961; and (b) that Dillon, Read & Co., Inc. ("Dillon, Read"), a corporation with offices in the City of New York, is engaged in the investment banking business and has rendered financial advice to TWA.

7. Denies each and every averment of paragraph [2549] 50 thereof, except that (a) during 1960 Equitable, Metropolitan and Irving and certain banks associated with it informed TWA and Toolco that they would be willing to provide certain financing desired by TWA for the acquisition of jet aircraft theretofore ordered by Toolco on condition, among other things, that Toolco place the shares of TWA stock owned by it in a voting trust; and (b) Toolco agreed to the establishment of a voting trust for purposes and reasons known to it, and refers to a Voting Trust Agreement dated as of December 15, 1960 and certain other agreements referred to therein for the terms and conditions thereof.

Reply of Additional Defendant The Equitable Life Assurance Society of the United States to Counterclaims, January 25, 1963

8. Denies each and every averment of paragraph 51 thereof, except (a) that in December, 1960 Equitable and Metropolitan purchased a total of $92,800,000 principal amount of TWA's 6½% Equipment Mortgage Sinking Fund Notes due December 31, 1972 and TWA borrowed $72,800,000 from Irving and associated banks, evidenced by 6% Equipment Mortgage Serial Notes due December 31, 1961-December 31, 1964, all in connection with financing the acquisition by TWA of certain jet flight equipment; (b) that Toolco, TWA, Equitable, Metropolitan, Irving and others entered into a series of transactions and agreements whereby the 5,221,301 shares of TWA common stock then held by Toolco were placed in a voting trust, and refers to the aforementioned Voting Trust Agreement and the other agreements referred to therein for the terms and provisions thereof; and (c) that Breech and Irving Olds ("Olds") were selected by the Noteholders under the aforementioned Noteholders' Agreement, including Equitable and Metropolitan, as two of the three [2550] voting trustees with respect to said stock.

9. Denies each and every averment of paragraph 52 thereof, except refers to the aforementioned Voting Trust Agreement and the By-laws of TWA for the terms and provisions thereof.

10. Denies each and every averment of paragraph 53 and each subparagraph thereof, except as follows:

(a) denies each and every averment of subparagraph (a) thereof, except (i) that the TWA Board elected Tillinghast as President and chief executive officer effective in April, 1961 and that Tillinghast had

at one time acted as an attorney for a corporation of which Breech was an officer; and (ii) states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment thereof relating to consultations by Tillinghast with others than Equitable and its representatives;

(b) states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of subparagraph (b) thereof, except that TWA entered into an employment contract with Tillinghast, and refers thereto for the terms and conditions thereof;

(c) denies each and every averment of subparagraph (c) thereof, except that TWA entered into certain agreements with Boeing for the purchase of additional jet aircraft required by TWA and as contemplated by the Dillon, Read [2551] Plan at a total cost in excess of $187,500,000, and that TWA proposed to enter into agreements with Equitable, Metropolitan and Irving and its associated banks to supply a total of approximately $147,000,000 of such financing;

(d) states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of subparagraph (d) thereof, except (i) that in May, 1961 Toolco addressed certain communications to TWA, the voting trustees and Equitable, Metropolitan and Irving with regard to negotiations between TWA and Equitable, Metropolitan and Irving leading up to the agreements referred to above, and refers thereto for the terms and provisions thereof;

and (ii) denies that there was any self-dealing in such negotiations; and

(e) denies each and every averment of sub-paragraph (e) thereof, except (i) that TWA entered into agreements with Equitable, Metropolitan and Irving and its associated banks for the supplying of approximately $147,000,000 of additional financing to TWA and refers to such agreements for the terms and provisions thereof; and (ii) states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment relating to consent by Toolco with respect to the aforementioned agreements, except that Equitable did not seek the consent of Toolco.

11. Denies each and every averment of para- [2552] graphs 54, 55 and 56 thereof, except that Dillon, Read received certain payments from TWA for services rendered in connection with TWA's 1961 financing.

12. Denies each and every averment of paragraphs 58 and 59 thereof.

WITH RESPECT TO THE SECOND COUNTERCLAIM

13. With respect to paragraph 60 thereof repeats and reavers its responses to paragraphs 42 through 48 thereof, inclusive, and paragraphs 50 through 56 thereof, inclusive.

14. Denies each and every averment of paragraph 61 thereof, except refers to Section 408 of the Federal Aviation Act for the terms and provisions thereof.

Reply of Additional Defendant The Equitable Life Assurance Society of the United States to Counterclaims, January 25, 1963

15. Denies each and every averment of paragraph 62 and each subparagraph thereof except as follows:

(a) denies each and every averment of subparagraph (a) thereof, except that Prudential Life Insurance Company is the country's second largest insurance company;

(b) states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of subparagraph (b) thereof, except that Metropolitan has for many years been a supplier of financing to air carriers;

(c) states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of subparagraph (c) thereof, except that Equitable has for many years been a supplier of financing to air carriers [2553] and that as of December 30, 1960 it held obligations of air carriers including TWA in a principal amount in excess of $188,000,000; and

(d), (e) states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of subparagraphs (d) and (e) thereof, except that as of December 31, 1960 it held obligations of air carriers other than TWA in a principal amount in excess of $144,000,000.

16. Denies each and every averment of paragraph 63 thereof, except (a) that neither Equitable nor Metropolitan filed a petition for CAB approval of the voting trust and

the agreements made in connection therewith; and (b) refers to CAB order E-16195 dated December 29, 1960 for the terms and provisions thereof.

17. Denies each and every averment of paragraph 64 thereof, except that CAB approval has not been sought for certain August, 1961 agreements for the furnishing by Equitable, Metropolitan and others of additional financing to TWA, and refers to such agreements for the terms and provisions thereof.

18. Denies each and every averment of paragraphs 65 and 67 thereof.

WITH RESPECT TO THE THIRD COUNTERCLAIM

19. With respect to paragraph 68 thereof repeats and reavers its responses to paragraphs 42 through 48 thereof, inclusive, paragraphs 50 through 55 thereof, inclusive, and paragraph 62 thereof.

[2554] 20. Denies each and every averment of paragraph 69 thereof, except (a) that James F. Oates, Jr. ("Oates") is a citizen of the State of New York, and since June, 1957 has been its President and has participated in the consideration of its lending policies; (b) that Harry C. Hagerty ("Hagerty") was for a number of years prior to 1962 Vice Chairman of the Board of Directors of Metropolitan; and (c) states that it is without knowledge or information sufficient to form a belief as to the truth of the averments as to Hagerty's citizenship or that he was in a

position to determine or influence Metropolitan's lending policies.

21. States that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of paragraph 70 thereof, except that Ben-Fleming Sessel ("Sessel") has been a Vice President of Irving and a director of TWA for a number of years.

22. Denies each and every averment of paragraph 71 thereof, except (a) that approximately 78.2% of TWA's common stock is held in the voting trust; and (b) states that it is without knowledge or information sufficient to form a belief as to the truth of the averment thereof that a demand would be futile.

23. Denies each and every averment of paragraphs 72, 73, 74, 75, 76 and 77 thereof, except that in 1960 and 1961 Equitable, Metropolitan and Irving and certain banks associated with it entered into arrangements with TWA for the furnishing of financing in an aggregate amount in excess of $300,000,000, and refers to the agreements made in connection therewith for the terms [2555] and provisions thereof.

24. States that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of paragraph 78 thereof, except that from time to time Toolco has invested funds in TWA; that in 1955 it was necessary in order to maintain TWA's competitive position to arrange promptly for the acquisition and financing of jet-

powered aircraft; and that Toolco thereafter placed certain orders for jet-powered aircraft with The Boeing Company ("Boeing") and General Dynamics Corporation ("General Dynamics").

25. States that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of paragraph 79 thereof, except denies each and every averment of the third sentence thereof.

26. Denies each and every averment of paragraph 80 thereof, except that in 1956 it held TWA Sinking Fund Bonds in a principal amount of approximately $40,000,000.

27. Denies each and every averment of paragraph 81 and each subparagraph thereof, except that in 1958 it had discussions with Toolco and TWA with respect to the financing of a jet equipment program.

28. States that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of paragraph 82 thereof, except that in or about 1959 Dillon, Read was requested to advise in connection with the financing of a jet equipment program.

29. States that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of paragraph 83 thereof, except [2556] that Dillon, Read submitted to it a financing proposal contemplating leases to TWA of certain jet aircraft, and that it declined to accept such proposal.

Reply of Additional Defendant The Equitable Life Assurance Society of the United States to Counterclaims, January 25, 1968

30. States that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of paragraph 84 thereof, except that in 1959 TWA placed in transcontinental service certain Boeing jet aircraft temporarily leased by it from Toolco and that TWA's reported earnings before taxes exceeded $17.4 million and $15.2 million in 1959 and 1960, respectively.

31. States that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of paragraph 85 thereof, except that in 1959 and 1960 Toolco, Irving and other banks participated in financing the acquisition of certain jet aircraft utilized by TWA.

32. Denies each and every averment of paragraph 86 and each subparagraph thereof.

33. States that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of paragraph 87 thereof, except that the applicable indenture relating to TWA's then indebtedness to Equitable prohibited such rental payments and that Equitable declined to waive those provisions.

34. States that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of paragraph 88 thereof, except (a) that the so-called Dillon, Read Plan was presented to it in March, 1960 in the form of memoranda dated March 16 [2557] and 17, 1960 and thereafter in various subsequent memoranda, to which reference is made for the terms and provisions

thereof; (b) that by memoranda dated March 23, 24 and 28, 1960, Equitable set forth at the request of TWA and Dillon, Read its preliminary expression of its requirements for continuing to negotiate for participation in the financing contemplated by the Dillon, Read Plan, and refers thereto for the terms and provisions thereof; and (c) that certain of such memoranda were signed by Toolco.

35. States that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of paragraph 89 thereof, except (a) that in or about April, 1960 Irving undertook to form a banking group for the purpose of providing interim and other financing to TWA, Metropolitan indicated its willingness on certain conditions to supply certain of the financing contemplated by the Dillon, Read Plan and TWA indicated its willingness to accept a 6% interest rate on certain of the financing and a 6½% rate on certain other of the financing; and (b) denies that a 6½% interest rate was in excess of that involved in any other financing supplied by Equitable to any other corporation in 1961 or that Equitable entered into any agreement as to interest rates with Metropolitan, Irving or members of the banking groups.

36. Denies each and every averment of paragraph 90 thereof, except (a) that in or about May, 1960 Equitable, Metropolitan and Irving and its associated banks respectively approved in principle participation in certain financing contemplated by the Dillon, Read Plan, subject to various conditions; (b) that Toolco approved in principle [2558] certain financing proposals set forth in the Dillon, Read

Plan and entered into agreements guaranteeing TWA's Sinking Fund Bonds held by Equitable and interim bank loans to TWA for repayment of existing loans and purchase of jet equipment; (c) that the maturity of such Bonds was accelerated to the same date as that of the interim bank financing, which was in turn the initial closing date for certain of the financing contemplated by the Dillon, Read Plan; (d) that May 31, 1960 was at one time discussed as the earliest possible closing date and that the closing was at one time scheduled for July 21, 1960; (e) that TWA's President, Charles Thomas ("Thomas"), had requested Hughes, the President and sole stockholder of Toolco, which controlled TWA, to give consideration to a definitive employment arrangement with TWA involving a salary increase and a retirement annuity; and (f) states that it is without knowledge or information sufficient to form a belief as to whether the requests of Thomas were communicated to Toolco or TWA by others than Thomas or whether Thomas stated to anyone prior to July, 1960 that he would not remain as President of TWA unless his requests were granted.

37. Denies each and every averment of paragraph 91 and each subparagraph thereof.

38. States that is is without knowledge or information sufficient to form a belief as to the truth of each and every averment of paragraph 92 thereof, except (a) that long prior to July 23, 1960 Thomas had requested that Hughes give consideration to a definitive employment arrangement with TWA involving a salary increase and [2559] retire-

ment annuity; and, (b) denies each and every averment thereof in so far as it alleges any conspiracy.

39. Denies each and every averment of paragraph 93 thereof, except that on July 21, 1960 Toolco advised representatives of certain of the lending institutions that Thomas intended to resign but requested that notwithstanding such imminent resignation they nevertheless proceed to loan to TWA an amount in excess of $100 million with the understanding that Toolco would place its stock in a voting trust under certain conditions; that Thomas represented his intention to resign and did resign; that there was a materially adverse change in TWA's management; and that Equitable, Metropolitan and Irving and its associated banks by reason of such adverse change justifiably declined to proceed with the closing then scheduled for July 21, 1960.

40. Denies each and every averment of paragraph 94 and each subparagraph thereof, except as follows:

(a) denies each and every averment of subparagraph (a) thereof, except that it and Metropolitan made certain proposals by letters to TWA dated July 28, 1960, to which reference is made for the terms and provisions thereof, and that the maturity of the Toolco-guaranteed TWA debt was extended through August 31, 1960;

(b) states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of subparagraph (b) thereof, except that it was advised on July 29, 1960 by a representative of TWA that Irving and its associated banks were

willing to extend the [2560] maturity of $27,000,000 already loaned to TWA provided that TWA agree not to purchase any new aircraft during the period of extension;

(c) denies each and every averment of subparagraph (c) thereof, except that Hughes and other representatives of Toolco mentioned the names of certain persons whom they indicated that Hughes might be willing to designate as President of TWA to succeed Thomas;

(d), (e) states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of subparagraphs (d) and (e) thereof, except that Irving attempted to formulate a financing plan;

(f) denies each and every averment of subparagraph (f) thereof, except that delay in the arrangement of permanent financing for jet aircraft would damage TWA;

(g), (h) states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of subparagraphs (g) and (h) thereof, except (i) that Irving presented to Toolco a memorandum dated September 26, 1960 and Toolco directed letters to Irving dated September 27 and October 5, 1960, to which reference is made for the terms and provisions thereof; and (ii) denies the averments thereof in so far as they allege any conspiracy;

(i) denies each and every averment of subparagraph (i) thereof, except (i) that a meeting [2561] of

Irving and its associated banks was held on October 6, 1960 to consider a Toolco proposal; (ii) that a representative of Equitable attended a part of that meeting at the invitation of Sessel; (iii) that bank representatives stated that Hughes had stated that a voting trust would be preferable to receivership; and (iv) that the banks indicated their position that any TWA financing by them must include a voting trust in order to ensure capable management and that they would so inform Toolco's representatives, that they would proceed with the Dillon, Read Plan if the insurance companies would also do so, that if Toolco and Hughes did not accept a voting trust the banks would set-off at the opening of business on October 7, 1960 deposit balances against outstanding loans to TWA and Toolco, and that Hughes would have until 5:00 P.M. E.D.S.T. to agree to accept a voting trust;

(j) denies each and every averment of subparagraph (j) thereof, except (i) that when representatives of TWA and Toolco came into the aforementioned meeting in mid-afternoon Sessel told them that any TWA financing by the banks must include a voting trust and that Toolco by its President Hughes must agree to accept a voting trust before 5:00 P.M. E.D.S.T.; and (ii) states that it is without knowledge or information sufficient to form a belief as to the truth of the averments of the last two [2562] sentences thereof;

(k) states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of subparagraph (k) thereof, except denies that any Equitable representative accepted in principle the provision referred to;

(l) denies each and every averment of subparagraph (l) thereof, except that Toolco requested the privilege of purchasing prior to maturity the TWA indebtedness held by Equitable and Metropolitan, and that each stated that it would agree to that request if Toolco agreed to pay a price for that privilege calculated to protect the yield on its investment;

(m) states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of subparagraph (m) thereof, except that Toolco submitted a proposal to Equitable by letter dated October 17, 1960, to which reference is made for the terms and provisions thereof, and that such proposal was not accepted by Irving;

(n) denies each and every averment of subparagraph (n) thereof, except that Equitable and Metropolitan advised Toolco of the terms on which each of them would be willing to participate in certain financing contemplated by the Dillon, Read Plan by letters dated October 19, 1960, to which [2563] reference is made for the terms and provisions thereof;

(o) states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of subparagraph (o) thereof, except that Irving directed a letter to TWA and Toolco dated October 19, 1960, to which reference is made for the terms and provisions thereof;

(p) states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of subparagraph (p) thereof, ex-

cept (i) that Equitable and Metropolitan each requested that Toolco agree to pay it for the privilege of purchasing the TWA indebtedness to be held by it prior to the maturity thereof a price calculated to protect the yield on its investment; (ii) that Toolco, after a request for reduction of the price proposed by each was declined, agreed to pay such price; and (iii) denies the averments thereof in so far as they allege any conspiracy;

(q) states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of subparagraph (q) thereof, except that Toolco directed letters dated October 22, 1960 to Irving, Equitable and Metropolitan, to which reference is made for the terms and provisions thereof; that there was publicity as to Toolco's position set forth in such letters; and that Irving and certain other banks offset [2564] certain TWA balances against TWA's debts to those banks; and

(r) denies each and every averment of subparagraph (r) thereof, except that the Toolco efforts, if any, to develop an alternative financing plan were unsuccessful and that Toolco agreed to the establishment of a voting trust.

41. Denies each and every averment of paragraph 95 thereof, except that (a) in December, 1960 certain transactions and agreements contemplated by the Dillon, Read Plan were effectuated and in connection therewith Toolco placed the common stock of TWA owned by it in a voting trust; (b) TWA after December, 1960 undertook certain

obligations which it is not bound to discharge before the end of the term of the voting trust; and (c) Breech has served as a voting trustee and Chairman of TWA's Board of Directors and Tillinghast has served as TWA's President.

42. Denies each and every averment of paragraph 96 and each subparagraph thereof, except as follows:

(a) denies each and every averment of subparagraph (a) thereof, except that elections of TWA's directors were held at TWA stockholder meetings on February 28 and April 27, 1961; that Raymond Holliday ("Holliday") is a voting trustee named by Toolco; and that Breech was elected Chairman of the TWA Board;

(b) denies each and every averment of subparagraph (b) thereof, except (i) that the TWA Board elected Tillinghast as President and chief [2565] executive officer effective in April, 1961; (ii) that TWA entered into an employment contract with Tillinghast, and refers thereto for the terms and conditions thereof; and (iii) states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment thereof relating to consultations by Tillinghast with others than Equitable and its representatives;

(c) states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of subparagraph (c) thereof, except (i) that the traffic on TWA's routes has for many years decreased in winter months, in part because of

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TWA's route structure; that the traffic of Northeast Airlines, Inc. ("Northeast") has recently increased in the winter months, in part because of Northeast's route structure; that in 1960 Toolco entered into negotiations with Atlas Corporation ("Atlas") regarding a Northeast-TWA merger; that it was advised that in 1960 the directors of Northeast submitted to TWA a proposed merger agreement; and that such agreement was not accepted; and (ii) denies each and every allegation thereof in so far as it alleges any conspiracy or any failure to perform any obligations owed by Equitable to anyone;

(d) denies each and every averment contained in subparagraph (d) thereof, except (i) that TWA made an offering of subordinated debentures with [2566] warrants attached, and refers to the prospectus and registration statement in connection therewith for the terms and conditions thereof; (ii) that Toolco requested a postponement of such offering; and (iii) states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment concerning Toolco's desire for a postponement;

(e) denies each and every averment of subparagraph (e) thereof, except that TWA entered into certain agreements with Boeing for the purchase of additional jet aircraft required by TWA and as contemplated by the Dillon, Read Plan at a total cost in excess of $187,500,000;

(f) denies each and every averment of subparagraph (f) thereof, except that Toolco addressed certain

financing proposals to TWA by letter dated June 10, 1961, to which reference is made for the terms and provisions thereof, and that TWA did not accept any of such proposals.

(g) denies each and every averment of subparagraphs (g) thereof, except that the instant action was commenced by TWA against Toolco and others on or about June 30, 1961 in the United States District Court for the Southern District of New York, and refers to the complaint for the allegations and claims for relief therein; and

(h) denies each and every averment of subparagraph (h) thereof, except (i) that TWA entered into agreements with Equitable, Metropolitan and [2567] Irving and its associated banks for the supplying of approximately $147,000,000 of additional financing to TWA and refers to such agreements for the terms and provisions thereof; and (ii) states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment relating to consent by or consultation with Toolco or TWA stockholders with respect to the aforementioned agreements except that Equitable did not consult with Toolco or seek the consent of Toolco or any TWA stockholder.

43. Denies each and every averment of paragraph 97 thereof, except (a) that TWA's reported 1960 operating revenues were more than four times greater than those of 1947, that its reported earnings before taxes were in excess of $15,000,000 for 1960 and were in excess of $95,600,000

for the period 1947-1960; and (b) states that it is without knowledge or information sufficient to form a belief as to the truth of the averments thereof relating to the years in which Toolco nominated a majority of TWA directors.

44. Denies each and every averment of paragraphs 98, 99 and 100 thereof, except that TWA's reported 1960 earnings before taxes were in excess of $15,000,000; that its reported 1961 losses before various tax credits, accelerated depreciation and write-offs were in excess of $27,000,000; and except states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of the last sentence of paragraph 98 thereof.

[2568] WITH RESPECT TO THE FOURTH COUNTERCLAIM

45. With respect to paragraph 102 thereof repeats and reavers its responses to paragraph 42 through 48 thereof, inclusive, paragraphs 62, 69 and 70 thereof, and paragraphs 73 through 97 thereof, inclusive.

46. Denies each and every averment of paragraphs 103, 104, 105 and 106 thereof.

47. Denies each and every averment of paragraph 108 thereof.

WITH RESPECT TO THE FIFTH COUNTERCLAIM

48. With respect to paragraph 109 thereof repeats and reavers its responses to paragraphs 42 through 48 thereof,

inclusive, paragraphs 62, 69 and 70 thereof, and paragraphs 78 through 97 thereof, inclusive.

49. Denies each and every averment of paragraphs 110, 111 and 112 thereof.

50. Denies each and every averment of paragraph 113 thereof, except refers to Section 218 of the Delaware Corporation Law, to an Option Agreement among Irving as Bank Agent, Equitable, Metropolitan and Toolco dated as of December 1, 1960 and to the aforementioned Voting Trust Agreement for the terms and provisions thereof.

51. Denies each and every averment of paragraphs 114, 115 and 116 thereof.

[2569] AS A FIRST DEFENSE TO EACH OF THE COUNTERCLAIMS, ALLEGES:

52. The counterclaims and each of them fail to state a claim upon which relief can be granted.

AS A SECOND DEFENSE TO EACH OF THE COUNTERCLAIMS, ALLEGES:

53. The counterclaims and each of them, to the extent rescission of the voting trust is sought thereby, fail sufficiently to allege that Toolco or TWA have taken, or are prepared to take, action on their part required to be taken in connection therewith.

AS A THIRD DEFENSE TO EACH OF THE COUNTERCLAIMS, ALLEGES:

54. Toolco voluntarily entered into the aforementioned Voting Trust Agreement and Equitable to the knowledge

of Toolco materially changed its position in reliance upon such action.

55. By reason thereof Toolco is estopped to claim that the voting trust is invalid.

AS A FOURTH DEFENSE TO THE FIRST COUNTERCLAIM, ALLEGES:

56. The claim set forth in this counterclaim, if any, is properly assertable if at all only by or on behalf of TWA, and Toolco therefore does not have standing to maintain it on its own behalf.

AS A FOURTH DEFENSE TO THE SECOND COUNTERCLAIM, ALLEGES:

57. Section 408 of the Federal Aviation Act does not provide for or authorize a private right of action.

[2570] AS A FIFTH DEFENSE TO THE SECOND COUNTERCLAIM, ALLEGES:

58. By motion dated December 22, 1960 as supplemented December 27, 1960, TWA submitted to the CAB certain proposed transactions, including the aforementioned Voting Trust Agreement, and requested whatever approval the CAB deemed required.

59. The CAB by order E-16195 dated December 29, 1960 granted approval of the transactions described in the aforementioned motion.

Reply of Additional Defendant The Equitable Life Assurance Society of the United States to Counterclaims, January 25, 1963

AS A SIXTH DEFENSE TO THE SECOND COUNTERCLAIM, ALLEGES:

60. Repeats and realleges the averments of paragraph 58 hereof.

61. Toolco participated in and consented to such submission and is estopped from asserting that the voting trust is invalid for lack of CAB approval.

AS A FOURTH DEFENSE TO THE THIRD COUNTERCLAIM, ALLEGES:

62. Pursuant to the aforementioned Agreement dated as of December 15, 1960 among TWA, Toolco, Breech, Holliday and Olds as voting trustees, to which reference is made for the terms and provisions thereof, Toolco transferred and assigned to the voting trustees all the common stock of TWA held by it.

63. By reason thereof Toolco lacks standing to assert this claim in behalf of TWA and its stockholders.

AS A FIFTH DEFENSE TO THE THIRD COUNTERCLAIM, ALLEGES:

64. Toolco has not requested the directors, the [2571] voting trustees or the other stockholders of TWA to assert or cause to be asserted such counterclaim on TWA's behalf.

65. Toolco has failed to set forth sufficient reasons for its failure to make such request.

Reply of Additional Defendant The Equitable Life Assurance Society of the United States to Counterclaims, January 25, 1963

AS A SIXTH DEFENSE TO THE THIRD COUNTERCLAIM, ALLEGES:

66. Toolco does not adequately represent TWA or the stockholders of TWA on whose behalf it purports to sue, in that Toolco does not come into court with clean hands and is not a proper person to maintain this action.

AS A FOURTH DEFENSE TO THE FOURTH COUNTERCLAIM, ALLEGES:

67. The claim set forth in this counterclaim, if any, is properly assertable if at all only by or on behalf of TWA, and Toolco therefore does not have standing to maintain it on its own behalf.

WHEREFORE, defendant Equitable demands judgment dismissing the counterclaims, with prejudice, together with its costs and disbursements.

January 25, 1963

CRAVATH, SWAINE & MOORE

by JOHN R. HUPPER
A member of said firm

Attorneys for said defendant,
1 Chase Manhattan Plaza,
New York 5, N. Y.

Reply of Additional Defendant Metropolitan Life Insurance Company to Counterclaims, January 25, 1963

[2573]

[CAPTION]

Additional Defendant Metropolitan Life Insurance Company ("Metropolitan"), for its reply to the purported counterclaims of defendant Hughes Tool Company ("Toolco") against Metropolitan:

WITH RESPECT TO THE FIRST COUNTERCLAIM

1. States that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of paragraph 42 thereof, except that Toolco is a Delaware corporation with its principal place [2574] of business in Houston, Texas, and that all of its common stock is owned by Howard R. Hughes ("Hughes").

2. States that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of paragraph 43 thereof, except that (a) TWA is a Delaware corporation with executive offices in New York City; (b) TWA has been for a number of years a large domestic and international air carrier; (c) Toolco has for a number of years held a substantial stock interest in TWA, having acquired more than 78% of such stock prior to December, 1960; (d) Toolco in December, 1960 placed the shares of stock then held by it in a voting trust and since that time has held a beneficial interest in such shares; and (e) Toolco at various times between 1947 and 1960 nominated a majority of TWA's directors.

Reply of Additional Defendant Metropolitan Life Insurance Company to Counterclaims, January 25, 1963

3. States that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of paragraph 44 thereof, except (a) admits the averments of the first sentence thereof; (b) admits that it and The Equitable Life Assurance Society of the United States ("Equitable") are the country's first and third-largest insurance companies, respectively, with admitted assets of over $18.7 billion and $10.5 billion, respectively; and (c) admits that Equitable has for a number of years held certain indebtedness of Trans World Airlines, Inc. ("TWA") and that since December, 1960 Metropolitan has also held certain such indebtedness.

4. States that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of paragraph 45 thereof, except (a) that [2575] Irving Trust Company ("Irving") is a New York trust company with a place of business in the City of New York, that it has been one of TWA's principal commercial bankers, and that it and other lending institutions have made loans to Toolco and TWA.

5. Denies each and every averment of paragraph 46 thereof, except (a) states that it is without knowledge or information sufficient to form a belief as to the truth of the averments relating to the citizenship of Ernest R. Breech ("Breech"); and (b) admits that Breech has been since on or about April 27, 1961 Chairman of the Board of Directors of TWA; that he was from December, 1960 until his resignation effective on or about January 26, 1962 one of two voting trustees selected by the noteholders,

including Metropolitan and Equitable, under a Noteholders' Agreement dated as of December 1, 1960, to which reference is made for the terms and provisions thereof; and that he was designated by the "Notes Agent" thereunder as a voting trustee under a Voting Trust Agreement dated as of December 15, 1960, to which reference is made for the terms and provisions thereof.

6. States that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of paragraphs 47 and 48 thereof, except (a) Charles C. Tillinghast ("Tillinghast") has been President and chief executive officer of TWA since on or about April 17, 1961; and (b) that Dillon, Read & Co., Inc. ("Dillon, Read"), a corporation with offices in the City of New York, is engaged in the investment banking business and has rendered financial advice to TWA.

[2576] 7. Denies each and every averment of paragraph 50 thereof, except that (a) during 1960 Equitable, Metropolitan and Irving and certain banks associated with it informed TWA and Toolco that they would be willing to provide certain financing desired by TWA for the acquisition of jet aircraft theretofore ordered by Toolco on condition, among other things, that Toolco place the shares of TWA stock owned by it in a voting trust; and (b) Toolco agreed to the establishment of a voting trust for purposes and reasons known to it, and refers to a Voting Trust Agreement dated as of December 15, 1960 and certain other agreements referred to therein for the terms and conditions thereof.

Reply of Additional Defendant Metropolitan Life Insurance Company to Counterclaims, January 25, 1963

8. Denies each and every averment of paragraph 51 thereof, except (a) that in December, 1960 Equitable and Metropolitan purchased a total of $92,800,000 principal amount of TWA's 6½% Equipment Mortgage Sinking Fund Notes due December 31, 1972 and TWA borrowed $72,800,000 from Irving and associated banks, evidenced by 6% Equipment Mortgage Serial Notes due December 31, 1961-December 31, 1964, all in connection with financing the acquisition by TWA of certain jet flight equipment; (b) that Toolco, TWA, Equitable, Metropolitan, Irving and others entered into a series of transactions and agreements whereby the 5,221,301 shares of TWA common stock then held by Toolco were placed in a voting trust, and refers to the aforementioned voting trust agreement and the other agreements referred to therein for the terms and provisions thereof; and (c) that Breech and Irving Olds ("Olds") were selected by the Noteholders under the aforementioned Noteholders' Agreement, including Equitable and Metropolitan, as two of the three voting trustees with [2577] respect to said stock.

9. Denies each and every averment of paragraph 52 thereof, except refers to the aforementioned Voting Trust Agreement and the By-laws of TWA for the terms and provisions thereof.

10. Denies each and every averment of paragraph 53 and each subparagraph thereof, except as follows:

(a) denies each and every averment of subparagraph (a) thereof, except (i) that the TWA Board elected Tillinghast as President and chief executive

officer effective in April, 1961 and that Tillinghast had at one time acted as an attorney for a corporation of which Breech was an officer; and (ii) states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment thereof relating to consultations by Tillinghast with others than Metropolitan and its representatives;

(b) states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of subparagraph (b) thereof, except that TWA entered into an employment contract with Tillinghast, and refers thereto for the terms and conditions thereof;

(c) denies each and every averment of subparagraph (c) thereof, except that TWA entered into certain agreements with Boeing for the purchase of additional jet aircraft required by TWA and as contemplated by the Dillon, Read Plan at a total cost in excess of $187,500,000, and that TWA proposed to [2578] enter into agreements with Equitable, Metropolitan and Irving and its associated banks to supply a total of approximately $147,000,000 of such financing;

(d) states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of subparagraph (d) thereof, except (i) that in May, 1961 Toolco addressed certain communications to TWA, the voting trustees and Equitable, Metropolitan and Irving with regard to negotiations between TWA and Equitable, Metropolitan and

Irving leading up to the agreements referred to above, and refers thereto for the terms and provisions thereof; and (ii) denies that there was any self-dealing in such negotiations; and

(e) denies each and every averment of subparagraph (e) thereof, except (i) that TWA entered into agreements with Equitable, Metropolitan and Irving and its associated banks for the supplying of approximately $147,000,000 of additional financing to TWA and refers to such agreements for the terms and provisions thereof; and (ii) states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment relating to consent by Toolco with respect to the aforementioned agreements, except that Metropolitan did not seek the consent of Toolco.

11. Denies each and every averment of paragraphs 54, 55 and 56 thereof, except that Dillon, Read received certain payments from TWA for services rendered in connection with TWA's 1961 financing.

[2579] 12. Denies each and every averment of paragraphs 58 and 59 thereof.

WITH RESPECT TO THE SECOND COUNTERCLAIM

13. With respect to paragraph 60 thereof repeats and reavers its responses to paragraphs 42 through 48 thereof, inclusive, and paragraphs 50 through 56 thereof, inclusive.

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14. Denies each and every averment of paragraph 61 thereof, except refers to Section 408 of the Federal Aviation Act for the terms and provisions thereof.

15. Denies each and every averment of paragraph 62 and each subparagraph thereof, except as follows:

(a) denies each and every averment of subparagraph (a) thereof, except that Prudential Life Insurance Company is the country's second largest insurance company;

(b) states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of subparagraph (b) thereof, except that it has for many years been a supplier of financing to air carriers and as of December 31, 1960 held obligations of air carriers in a principal amount in excess of $288 million;

(c) states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of subparagraph (c) thereof, except that Equitable has for many years been a supplier of financing to air carriers; and

[2580] (d), (e) states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of subparagraphs (d) and (e) thereof, except that as of December 31, 1960 it held obligations of air carriers other than TWA in a principal amount in excess of $250,000,000.

Reply of Additional Defendant Metropolitan Life Insurance Company to Counterclaims, January 25, 1963

16. Denies each and every averment of paragraph 63 thereof, except (a) that neither Equitable nor Metropolitan filed a petition for CAB approval of the voting trust and the agreements made in connection therewith; and (b) refers to CAB order E-16195 dated December 29, 1960 for the terms and provisions thereof.

17. Denies each and every averment of paragraph 64 thereof, except that CAB approval has not been sought for certain August, 1961 agreements for the furnishing by Equitable, Metropolitan and others of additional financing to TWA, and refers to such agreements for the terms and provisions thereof.

18. Denies each and every averment of paragraphs 65 and 67 thereof.

WITH RESPECT TO THE THIRD COUNTERCLAIM

19. With respect to paragraph 68 thereof repeats and reavers its responses to paragraphs 42 through 48 thereof, inclusive, paragraphs 50 through 55 thereof, inclusive, and paragraph 62 thereof.

20. Denies each and every averment of paragraph 69 thereof, except (a) that James F. Oates, Jr. ("Oates") has for a number of years been President of Equitable; (b) that Harry C. Hagerty ("Hagerty") is a citizen of the [2581] State of New York; that he was from prior to 1955 through October, 1959 its Financial Vice President and from November, 1959 through 1961 Vice Chairman of its Board of

Directors, and that during the period from prior to 1955 through 1961 he participated in the consideration of its lending policies; and (c) states that it is without knowledge or information sufficient to form a belief as to the truth of the averments as to the citizenship of Oates or that he was in a position to determine or influence Equitable's lending policies.

21. States that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of paragraph 70 thereof except that Ben-Fleming Sessel ("Sessel") has been a Vice President of Irving and a director of TWA for a number of years.

22. Denies each and every averment of paragraph 71 thereof, except (a) that approximately 78.2% of TWA's common stock is held in the voting trust; and (b) states that it is without knowledge or information sufficient to form a belief as to the truth of the averment thereof that a demand would be futile.

23. Denies each and every averment of paragraphs 72, 73, 74, 75, 76 and 77 thereof, except that in 1960 and 1961 Equitable, Metropolitan and Irving and certain banks associated with it entered into arrangements with TWA for the furnishing of financing in an aggregate amount in excess of $300,000,000, and refers to the agreements made in connection therewith for the terms and provisions thereof.

24. States that it is without knowledge or information sufficient to form a belief as to the truth of each [2582]

and every averment of paragraph 78 thereof, except that from time to time Toolco has invested funds in TWA; that in 1955 it was necessary in order to maintain TWA's competitive position to arrange promptly for the acquisition and financing of jet-powered aircraft; and that Toolco thereafter placed certain orders for jet-powered aircraft with The Boeing Company ("Boeing") and General Dynamics Corporation ("General Dynamics").

25. States that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of paragraph 79 thereof, except denies each and every averment of the third sentence thereof.

26. Denies each and every averment of paragraph 80 thereof, except that in 1956 Equitable held certain indebtedness of TWA.

27. States that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of paragraph 81 thereof.

28. States that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of paragraph 82 thereof.

29. States that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of paragraph 83 thereof.

30. States that it is without knowledge or information sufficient to form a belief as to the truth of each and every

averment of paragraph 84 thereof, except that in 1959 TWA placed in transcontinental service certain Boeing jet aircraft temporarily leased by it from Toolco [2583] and that TWA's reported earnings before taxes exceeded $17.4 million and $15.2 million in 1959 and 1960, respectively.

31. States that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of paragraph 85 thereof, except that in 1959 and 1960 Toolco, Irving and other banks participated in financing the acquisition of certain jet aircraft utilized by TWA.

32. Denies each and every averment of paragraph 86 and each subparagraph thereof.

33. States that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of paragraph 87 thereof.

34. States that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of paragraph 88 thereof, except (a) that the so-called Dillion, Read Plan was presented to Equitable prior to April, 1960; (b) that the terms and provisions of such Plan are set forth in various memoranda, to which reference is made for the terms and provisions thereof; (c) that Equitable set forth in various memoranda certain preliminary expressions of its requirements for continuing to negotiate for participation in the financing contemplated by the Dillon, Read Plan, to which reference is made for the terms and provisions thereof; and (d) that certain of such memoranda were signed by Toolco.

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35. States that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of paragraph 89 thereof, except [2584] (a) that in or about April, 1960 Irving undertook to form a banking group for the purpose of providing interim and other financing to TWA, Metropolitan indicated its willingness on certain conditions to supply certain of the financing contemplated by the Dillon, Read Plan and TWA indicated its willingness to accept a 6% interest rate on certain of the financing and a 6½% rate on certain other of the financing; and (b) denies that Metropolitan entered into any agreement as to interest rates with Equitable, Irving or members of the banking group.

36. Denies each and every averment of paragraph 90 thereof, except (a) that in or about May, 1960 Equitable, Metropolitan and Irving and its associated banks respectively approved in principal participation in certain financing contemplated by the Dillon, Read Plan, subject to various conditions; (b) that Toolco approved in principle certain financing proposals set forth in the Dillon, Read Plan and entered into agreements guaranteeing TWA's Sinking Fund Bonds held by Equitable and interim bank loans to TWA for repayment of existing loans and purchase of jet equipment; (c) that the maturity of such Bonds was accelerated to the same date as that of the interim bank financing, which was in turn the initial closing date for certain of the financing contemplated by the Dillon, Read Plan; (d) that May 31, 1960 was at one time discussed as the earliest possible closing date and that the closing was at one time scheduled for July 21, 1960; (e) that TWA's President, Charles

Thomas ("Thomas"), had requested Hughes, the President and sole stockholder of Toolco, which controlled TWA, to give consideration to a definitive employ- [2585] ment arrangement with TWA involving a salary increase and a retirement annuity; and (f) states that it is without knowledge or information sufficient to form a belief as to whether the requests of Thomas were communicated to Toolco or TWA by others than Thomas or whether Thomas stated to anyone prior to July, 1960 that he would not remain as President of TWA unless his requests were granted.

37. Denies each and every averment of paragraph 91 and each subparagraph thereof.

38. States that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of paragraph 92 thereof, except (a) that long prior to July 23, 1960 Thomas had requested that Hughes give consideration to a definitive employment arrangement with TWA involving a salary increase and retirement annuity; and (b) denies each and every averment thereof in so far as it alleges any conspiracy.

39. Denies each and every averment of paragraph 93 thereof, except that on July 21, 1960 Toolco advised representatives of certain of the lending institutions that Thomas intended to resign but requested that notwithstanding such imminent resignation they nevertheless proceed to loan to TWA an amount in excess of $100 million with the understanding that Toolco would place its stock in a voting

trust under certain conditions; that Thomas represented his intention to resign and did resign; that there was a materially adverse change in TWA's management; and that Equitable, Metropolitan and Irving and its associated banks by reason of such adverse change justifiably declined to proceed with [2586] the closing then scheduled for July 21, 1960.

40. Denies each and every averment of paragraph 94 and each subparagraph thereof, except as follows:

(a) denies each and every averment of subparagraph (a) thereof, except that it and Equitable made certain proposals by letters to TWA dated July 28, 1960, to which reference is made for the terms and provisions thereof, and that the maturity of the Toolco-guaranteed TWA debt was extended through August 31, 1960;

(b) states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of subparagraph (b) thereof;

(c) denies each and every averment of subparagraph (c) thereof, except that it was informed that Hughes and other representatives of Toolco mentioned the names of certain persons whom they indicated that Hughes might be willing to designate as President of TWA to succeed Thomas;

(d), (e) states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of subparagraphs (d) and

(e) thereof, except that Irving attempted to formulate a financing plan;

(f) denies each and every averment of subparagraph (f) thereof, except that delay in the arrangement of permanent financing for jet aircraft would damage TWA;

(g), (h) states that it is without knowledge [2587] or information sufficient to form a belief as to the truth of each and every averment of subparagraphs (g) and (h) thereof, except (i) that it was advised that certain financing plans, involving General Dynamics, had been proposed but had not materialized; and (ii) denies the averments thereof in so far as they allege any conspiracy;

(i) states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of subparagraph (i) thereof, except that on October 6, 1960, there was a meeting attended by representatives of Irving and certain of its associated banks at which was considered a Toolco proposal;

(j) denies each and every averment of subparagraph (j) thereof, except that certain representatives of Toolco attended the aforementioned meeting of October 6, 1960;

(k) states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of subparagraph (k) thereof;

(l) denies each and every averment of subparagraph (l) thereof, except that Toolco requested the privilege of purchasing prior to maturity the TWA indebtedness held by Equitable and Metropolitan, and that each stated that it would agree to that request if Toolco agreed to pay a price for that privilege calculated to protect the yield on its investment;

[2588] (m) states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of subparagraph (m) thereof, except that Toolco submitted a proposal to Equitable by letter dated October 17, 1960, to which reference is made for the terms and provisions thereof, and that such proposal was not accepted by Irving;

(n) denies each and every averment of subparagraph (n) thereof, except that Metropolitan and Equitable advised Toolco of the terms on which each of them would be willing to participate in certain financing contemplated by the Dillon, Read Plan by letters dated October 19, 1960, to which reference is made for the terms and provisions thereof;

(o) states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of subparagraph (o) thereof, except that Irving directed a letter to TWA and Toolco dated October 19, 1960, to which reference is made for the terms and provisions thereof;

(p) states that it is without knowledge or information sufficient to form a belief as to the truth of each

and every averment of subparagraph (p) thereof, except (i) that Metropolitan and Equitable each requested that Toolco agree to pay it for the privilege of purchasing the TWA indebtedness to be held by it prior to the maturity thereof a price [2589] calculated to protect the yield on its investment; (ii) that Toolco, after a request for reduction of the price proposed by each was declined, agreed to pay such price; and (iii) denies the averments thereof in so far as they allege any conspiracy;

(q) states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of subparagraph (q) thereof, except that Toolco directed letters dated October 22, 1960 to Irving, Equitable and Metropolitan, to which reference is made for the terms and provisions thereof; that there was publicity as to Toolco's position set forth in such letters; and that Irving and certain other banks offset certain TWA balances against TWA's debts to those banks; and

(r) denies each and every averment of subparagraph (r) thereof, except that the Toolco efforts, if any, to develop an alternative financing plan were unsuccesful and that Toolco agreed to the establishment of a voting trust.

41. Denies each and every averment of paragraph 95 thereof, except that (a) in December, 1960 certain transactions and agreements contemplated by the Dillon, Read Plan were effectuated and in connection therewith Toolco

placed the common stock of TWA owned by it in a voting trust; (b) TWA after December, 1960 undertook certain obligations which it it is not bound to discharge before the end of the term of the [2590] voting trust; and (c) Breech has served as a voting trustee and Chairman of TWA's Board of Directors and Tillinghast has served as TWA's President.

42. Denies each and every averment of paragraph 96 and each subparagraph thereof, except as follows:

(a) denies each and every averment of subparagraph (a) thereof, except that elections of TWA's directors were held at TWA stockholder meetings on February 28 and April 27, 1961; that Raymond Holliday ("Holliday") is a voting trustee named by Toolco; and that Breech was elected Chairman of the TWA Board;

(b) denies each and every averment of subparagraph (b) thereof, except (i) that the TWA Board elected Tillinghast as President and chief executive officer effective in April, 1961; (ii) that TWA entered into an employment contract with Tillinghast, and refers thereto for the terms and conditions thereof; and (iii) states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment thereof relating to consultations by Tillinghast with others than Metropolitan and its representatives;

(c) states that it is without knowledge or information sufficient to form a belief as to the truth of each

and every averment of subparagraph (c) thereof, except (i) that the traffic on TWA's routes has for many years decreased in winter [2591] months, in part because of TWA's route structure; that the traffic of Northeast Airlines, Inc. ("Northeast") has recently increased in the winter months, in part because of Northeast's route structure; that in 1960 Toolco entered into negotiations with Atlas Corporation ("Atlas") regarding a Northeast-TWA merger; that it was advised that in 1960 the directors of Northeast submitted to TWA a proposed merger agreement; and that such agreement was not accepted; and (ii) denies each and every allegation thereof in so far as it alleges any conspiracy or any failure to perform any obligations owed by Metropolitan to anyone;

(d) denies each and every averment contained in subparagraph (d) thereof, except (i) that TWA made an offering of subordinated debentures with warrants attached, and refers to the prospectus and registration statement in connection therewith for the terms and conditions thereof; (ii) that Toolco requested a postponement of such offering; and (iii) states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment concerning Toolco's desire for a postponement;

(e) denies each and every averment of subparagraph (e) thereof, except that TWA entered into certain agreements with Boeing for the purchase of additional jet aircraft required by TWA and as contemplated by the Dillon, Read Plan at a [2592] total cost in excess of $187,500,000;

(f) denies each and every averment of subparagraph (f) thereof, except that Toolco addressed certain financing proposals to TWA by letter dated June 10, 1961, to which reference is made for the terms and provisions thereof, and that TWA did not accept any of such proposals.

(g) denies each and every averment of subparagraph (g) thereof, except that the instant action was commenced by TWA against Toolco and others on or about June 30, 1961 in the United States District Court for the Southern District of New York, and refers to the complaint for the allegations and claims for relief therein; and

(h) denies each and every averment of subparagraph (h) thereof, except (i) that TWA entered into agreements with Equitable, Metropolitan and Irving and its associated banks for the supplying of approximately $147,000,000 of additional financing to TWA and refers to such agreements for the terms and provisions thereof; and (ii) states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment relating to consent by or consultation with Toolco or TWA stockholders with respect to the aforementioned agreements, except that Metropolitan did not consult with Toolco or seek the consent of Toolco or any TWA stockholder;

[2593] 43. Denies each and every averment of paragraph 97 thereof, except (a) that TWA's reported 1960

operating revenues were more than four times greater than those of 1947, that its reported earnings before taxes were in excess of $15,000,000 for 1960 and were in excess of $95,600,000 for the period 1947-1960; and (b) states that it is without knowledge or information sufficient to form a belief as to the truth of the ayerments thereof relating to the years in which Toolco nominated a majority of TWA directors.

44. Denies each and every averment of paragraphs 98, 99 and 100 thereof, except that TWA's reported 1960 earnings before taxes were in excess of $15,000,000; that its reported 1961 losses before various tax credits, accelerated depreciation and write-offs were in excess of $27,000,000; and except states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment of the last sentence of paragraph 98 thereof.

WITH RESPECT TO THE FOURTH COUNTERCLAIM

45. With respect to paragraph 102 thereof repeats and reavers its responses to paragraphs 42 through 48 thereof, inclusive, paragraphs 62, 69 and 70 thereof, and paragraphs 73 through 97 thereof, inclusive.

46. Denies each and every averment of paragraphs 103, 104, 105 and 106 thereof.

47. Denies each and every averment of paragraph 108 thereof.

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[2594] WITH RESPECT TO THE FIFTH COUNTERCLAIM

48. With respect to paragraph 109 thereof repeats and reavers its responses to paragraphs 42 through 48 thereof, inclusive, paragraphs 62, 69 and 70 thereof, and paragraphs 78 through 97 thereof, inclusive.

49. Denies each and every averment of paragraphs 110, 111 and 112 thereof.

50. Denies each and every averment of paragraph 113 thereof, except refers to Section 218 of the Delaware Corporation Law, to an Option Agreement among Irving as Bank Agent, Equitable, Metropolitan and Toolco dated as of December 1, 1960 and to the aforementioned Voting Trust Agreement for the terms and provisions thereof.

51. Denies each and every averment of paragraphs 114, 115 and 116 thereof.

AS A FIRST DEFENSE TO EACH OF THE COUNTERCLAIMS, ALLEGES:

52. The counterclaims and each of them fail to state a claim upon which relief can be granted.

AS A SECOND DEFENSE TO EACH OF THE COUNTERCLAIMS, ALLEGES:

53. The counterclaims and each of them, to the extent rescission of the voting trust is sought thereby, fail sufficiently to allege that Toolco or TWA have taken, or are

prepared to take, action on their part required to be taken in connection therewith.

AS A THIRD DEFENSE TO EACH OF THE COUNTERCLAIMS, ALLEGES:

54. Toolco voluntarily entered into the aforementioned Voting Trust Agreement and Metropolitan to the [2595] knowledge of Toolco materially changed its position in reliance upon such action.

55. By reason thereof Toolco is estopped to claim that the voting trust is invalid.

AS A FOURTH DEFENSE TO THE FIRST COUNTERCLAIM, ALLEGES:

56. The claim set forth in this counterclaim, if any, is properly assertable if at all only by or on behalf of TWA, and Toolco therefore does not have standing to maintain it on its own behalf.

AS A FOURTH DEFENSE TO THE SECOND COUNTERCLAIM, ALLEGES:

57. Section 408 of the Federal Aviation Act does not provide for or authorize a private right of action.

AS A FIFTH DEFENSE TO THE SECOND COUNTERCLAIM, ALLEGES:

58. By motion dated December 22, 1960 as supplemented December 27, 1960, TWA submitted to the CAB certain proposed transactions, including the aforementioned

Voting Trust Agreement, and requested whatever approval the CAB deemed required.

59. The CAB by order E-16195 dated December 29, 1960 granted approval of the transactions described in the aforementioned motion.

AS A SIXTH DEFENSE TO THE SECOND COUNTERCLAIM, ALLEGES:

60. Repeats and realleges the averments of paragraph 58 hereof.

[2596] 61. Toolco participated in and consented to such submission and is estopped from asserting that the voting trust is invalid for lack of CAB approval.

AS A FOURTH DEFENSE TO THE THIRD COUNTERCLAIM, ALLEGES:

62. Pursuant to the aforementioned Agreement dated as of December 15, 1960 among TWA, Toolco, Breech, Holliday and Olds as voting trustees, to which reference is made for the terms and provisions thereof, Toolco transferred and assigned to the voting trustees all the common stock of TWA held by it.

63. By reason thereof Toolco lacks standing to assert this claim in behalf of TWA and its stockholders.

AS A FIFTH DEFENSE TO THE THIRD COUNTERCLAIM, ALLEGES:

64. Toolco has not requested the directors, the voting trustees or the other stockholders of TWA to assert or cause to be asserted such counterclaim on TWA's behalf.

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65. Toolco has failed to set forth sufficient reasons for its failure to make such request.

AS A SIXTH DEFENSE TO THE THIRD COUNTERCLAIM, ALLEGES:

66. Toolco does not adequately represent TWA or the stockholders of TWA on whose behalf it purports to sue, in that Toolco does not come into court with clean hands and is not a proper person to maintain this action.

AS A FOURTH DEFENSE TO THE FOURTH COUNTERCLAIM, ALLEGES:

67. The claim set forth in this counterclaim, if any, is properly assertable if at all only by or on [2597] behalf of TWA, and Toolco therefore does not have standing to maintain it on its own behalf.

WHEREFORE, defendant Metropolitan demands judgment dismissing the counterclaims, with prejudice, together with its costs and disbursements.

January 25, 1963

CRAVATH, SWAINE & MOORE

by JOHN R. HUPPER
A member of said firm

Attorneys for said defendant,
1 Chase Manhattan Plaza,
New York 5, N. Y.

Reply of Additional Defendants Irving Trust Company and Ben-Fleming Sessel to Counterclaims, January 25, 1963

[2648]

[CAPTION]

Additional defendants Irving Trust Company ("Irving") and Ben-Fleming Sessel ("Sessel"), for their reply to the alleged counterclaims of Hughes Tool Company ("Toolco") asserted against them in Toolco's answer, allege as follows:

WITH RESPECT TO THE FIRST COUNTERCLAIM

1. These additional defendants admit the allegations of paragraph 42.

2. Replying to the allegations of paragraph 43, these additional defendants admit the allegations contained [2649] in the first three sentences of said paragraph, and further admit that over 78% of the capital stock of Trans World Airlines, Inc. ("TWA") was placed in a voting trust in December 1960. Except as herein expressly admitted, these additional defendants deny that they have knowledge or information sufficient to form a belief as to the truth of each and every allegation of paragraph 43.

3. Replying to the allegations of paragraph 44, these additional defendants admit that The Equitable Life Assurance Society of the United States ("Equitable") and Metropolitan Life Insurance Company ("Metropolitan") are corporations organized and existing under the laws of the State of New York, with their principal places of busi-

ness in the City of New York; that Equitable and Metropolitan are the country's third and first largest insurance companies, respectively; that from 1947 to date Equitable has held certain indebtedness of TWA; and that, at all times since December 1960, Metropolitan has held certain indebtedness of TWA. Except as herein expressly admitted, these additional defendants deny that they have knowledge or information sufficient to form a belief as to the truth of each and every allegation of paragraph 44.

4. Replying to the allegations of paragraph 45, these additional defendants admit that Irving is a corporation created by Chapter 616 of the Laws of the State of New York of 1871, that it is subject to the banking laws of the State of New York, that its principal place of business is in the City of New York, that it is and for many years has been one of TWA's principal commercial bankers and [2650] has made loans and participated with other lenders in making loans to TWA, and that for many years prior to 1961 it was one of Toolco's principal commercial bankers and made loans and participated with other lenders in making loans to Toolco. Except as herein expressly admitted, these additional defendants deny each and every allegation of paragraph 45.

5. Replying to the allegations of paragraph 46, these additional defendants admit that Ernest R. Breech ("Breech") was from December 1960 until his resignation on or about January 26, 1962 one of two voting trustees selected by the noteholders, including Equitable and Metropolitan, under a Noteholders' Agreement dated as of

December 1, 1960 (the "Noteholders' Agreement"), to which reference is hereby made for a statement of the terms and provisions thereof; that he was designated by the Notes Agent under the Noteholders' Agreement as a voting trustee under a Voting Trust Agreement dated as of December 15, 1960 (the "Voting Trust Agreement"), to which reference is hereby made for a statement of the terms and provisions thereof; and that Breech is, and at all times since April 27, 1961 has been, chairman of the Board of Directors of TWA. These additional defendants deny that they have knowledge or information sufficient to form a belief as to the truth of the allegation that Breech is a citizen of the State of Michigan. Except as herein expressly admitted or denied, these additional defendants deny each and every allegation of paragraph 46.

6. Replying to the allegations of paragraph 47, these additional defendants admit that Charles C. Tillinghast, Jr. ("Tillinghast") is, and since April 17, 1961 has [2651] been, president and chief executive officer of TWA. Except as herein expressly admitted, these additional defendants deny that they have knowledge or information sufficient to form a belief as to the truth of each and every allegation of paragraph 47.

7. Replying to the allegations of paragraph 48, these additional defendants admit that Dillon, Read & Co. Inc. ("Dillon Read") is a corporation with its principal place of business in the City of New York, that it is engaged in the investment banking business, and that it has rendered financial advice to TWA. Except as herein expressly ad-

mitted, these additional defendants deny that they have knowledge or information sufficient to form a belief as to the truth of each and every allegation of paragraph 48.

8. These additional defendants deny each and every allegation of paragraph 49.

9. Replying to the allegations of paragraph 50 and of each subparagraph thereof, these additional defendants admit that, in December 1960, Equitable and Metropolitan, together with a group of nine commercial banks which included Irving and for which Irving acted as agent, agreed to provide financing to TWA on the condition, among others, that Toolco prior to any default place all shares of TWA stock which it owned in a voting trust having three trustees, two of whom would be selected and appointed by the holders of a majority of the notes issued in connection with the financing; that financing was required by TWA in order for it to acquire jet aircraft theretofore ordered by Toolco; that Toolco agreed to deposit its shares of TWA [2652] stock in a voting trust; and that, in connection with the financing which was consummated in December 1960, Toolco entered into the Voting Trust Agreement and into an Option Agreement dated as of December 1, 1960 (the "Option Agreement"), to which agreements reference is hereby made for a statement of the terms and provisions thereof. Except as herein expressly admitted, these additional defendants deny each and every allegation of paragraph 50 and of each subparagraph thereof.

10. Replying to the allegations of paragraph 51 and of each subparagraph thereof, these additional defendants

admit that, in December 1960, Toolco, TWA, Equitable, Metropolitan, Irving and others entered into a series of transactions for the financing of the acquisition of certain jet flight equipment ordered by Toolco; that, pursuant to the December 1960 Note Purchase Agreements, Equitable and Metropolitan bought from TWA an aggregate of $92,800,000 principal amount of TWA's 6½% Equipment Mortgage Sinking Fund Notes due December 31, 1972; that, pursuant to the December 1960 Loan Agreement, the banks named therein loaned to TWA an aggregate of $72,200,000 evidenced by 6% Equipment Mortgage Serial Notes due December 31, 1961—December 31, 1964; that Toolco agreed to and did deposit 5,221,301 shares of TWA's common stock in a voting trust pursuant to the Voting Trust Agreement; and that Breech and Irving S. Olds ("Olds") were selected as two of the voting trustees by the noteholders, including Equitable and Metropolitan, under the Noteholders' Agreement, and were designated by the Notes Agent under the Noteholders' Agreement as voting trustees under the Voting Trust Agreement. These additional defend- [2653] ants hereby refer to the December 1960 Note Purchase Agreements, the December 1960 Loan Agreement, the Voting Trust Agreement and the Option Agreement for a statement of the terms and provisions thereof. Except as herein expressly admitted, these additional defendants deny each and every allegation of paragraph 51 and of each subparagraph thereof.

11. Replying to the allegations of paragraph 52, these additional defendants admit that the Voting Trust Agreement and the by-laws of TWA, to which reference is hereby

made for a statement of the terms and provisions thereof, create certain rights and powers. Except as herein expressly admitted, these additional defendants deny each and every allegation of paragraph 52.

12. (a) Replying to the allegations of subparagraph 53(a), these additional defendants admit that Tillinghast was elected president and chief executive officer of TWA by its Board of Directors; and that, prior to becoming president of TWA, Tillinghast had acted as counsel for a corporation of which Breech was an executive officer. These additional defendants deny that, prior to his acceptance of the presidency of TWA, Tillinghast consulted with representatives of Irving as to steps which could be taken to make it impossible for Toolco to terminate the voting trust and regain control of TWA in the foreseeable future. Except as herein expressly admitted or denied, these additional defendants deny that they have knowledge or information sufficient to form a belief as to the truth of each and every allegation of subparagraph 53(a).

[2654] (b) Replying to the allegations of subparagraph 53(b), these additional defendants admit that TWA entered into an employment contract with Tillinghast, to which reference is hereby made for a statement of the terms and provisions thereof. Except as herein expressly admitted, these additional defendants deny that they have knowledge or information sufficient to form a belief as to the truth of each and every allegation of subparagraph 53(b).

(c) Replying to the allegations of subparagraph 53(c), these additional defendants admit that, shortly after Tilling-

hast's election as president, TWA entered into agreements with The Boeing Company ("Boeing") for the purchase of additional jet aircraft from Boeing; that the aggregate cost of such jet aircraft and related equipment was in excess of $187,500,000; and that, in order to finance such purchases, TWA through Dillon Read entered into agreements with Metropolitan, Equitable and the banking group which included Irving and for which Irving acted as agent to supply an additional $147,000,000 of senior debt. Except as herein expressly admitted, these additional defendants deny each and every allegation of subparagraph 53(c).

(d) Replying to the allegations of subparagraph 53(d), these additional defendants admit that TWA, the voting trustees and the banks and insurance companies received communications from Toolco dated May 19, 1961 and May 26, 1961, to which reference is hereby made for a statement of the terms and provisions [2655] thereof. These additional defendants deny that they have knowledge or information sufficient to form a belief as to the truth of the allegation that Toolco learned of the proposed action in May 1961. Except as herein expressly admitted or denied, these additional defendants deny each and every allegation of subparagraph 53(d).

(e) Replying to the allegations of subparagraph 53(e), these additional defendants admit that, in August 1961, TWA entered into the July 1961 Note Purchase Agreements with Metropolitan and Equitable and the July 1961 Loan Agreement with the banks named therein and that TWA entered into the First Supplemental Indenture dated as of July 1, 1961, supplementing, amending and restating

the Indenture of Mortgage dated as of December 1, 1960, to all of which reference is hereby made for a statement of the terms and provisions thereof. These additional defendants further admit that neither TWA nor any of the banks or insurance companies sought or obtained the consent of Toolco to such agreements, and allege that such consent was not required. Except as herein expressly admitted, these additional defendants deny each and every allegation of subparagraph 53(e).

Except as herein expressly admitted or denied, these additional defendants deny each and every allegation of paragraph 53.

13. These additional defendants deny each and every allegation of paragraph 54.

14. Replying to the allegations of paragraph 55, [2656] these additional defendants admit that in connection with TWA's 1961 financing Dillon Read received compensation. Except as herein expressly admitted, these additional defendants deny each and every allegation of paragraph 55.

15. These additional defendants deny each and every allegation of paragraph 56.

16. These additional defendants deny each and every allegation of paragraphs 57, 58 and 59.

WITH RESPECT TO THE SECOND COUNTERCLAIM

17. Replying to the allegations of paragraph 60, these additional defendants repeat and reallege with the same

force and effect as if herein set forth in full each and every allegation contained in paragraphs 1 through 7, inclusive, and 9 through 15, inclusive, of this reply.

18. Replying to the allegations of paragraph 61, these additional defendants admit the existence of Section 408 of the Federal Aviation Act of 1958, to which reference is hereby made for a statement of the terms and provisions thereof. Except as herein expressly admitted, these additional defendants deny each and every allegation of paragraph 61.

19. These additional defendants deny that they have knowledge or information sufficient to form a belief as to the truth of each and every allegation of paragraph 62 and of each subparagraph thereof.

20. Replying to the allegations of paragraph 63, these additional defendants deny that they have knowledge or information sufficient to form a belief as to the truth of the allegation that neither Equitable nor Metropolitan [2657] sought or obtained the approval of the Board pursuant to Section 408 of the Federal Aviation Act of 1958. Except as herein expressly denied, these additional defendants deny each and every allegation of paragraph 63.

21. Replying to the allegations of paragraph 64, these additional defendants admit that, in August 1961, TWA entered into agreements with Metropolitan, Equitable and the banking group which included Irving and for which Irving acted as agent to supply to TWA an additional

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$147,000,000 of senior financing upon certain terms and conditions, and that no approval of the Civil Aeronautics Board was sought or obtained for such agreements. Except as herein expressly admitted, these additional defendants deny each and every allegation of paragraph 64.

22. These additional defendants deny each and every allegation of paragraphs 65, 66 and 67.

WITH RESPECT TO THE THIRD COUNTERCLAIM

23. Replying to the allegations of paragraph 68, these additional defendants repeat and reallege with the same force and effect as if herein set forth in full each and every allegation contained in paragraphs 1 through 7, inclusive, 9 through 14, inclusive, and 19 of this reply.

24. Replying to the allegations of paragraph 69, these additional defendants admit that James F. Oates, Jr. ("Oates") has for a number of years been president of Equitable, and that Harry C. Hagerty ("Hagerty") was for a number of years prior to 1962 vice chairman of the Board of Directors of Metropolitan. Except as herein expressly admitted, these additional defendants deny that they have [2658] knowledge or information sufficient to form a belief as to the truth of each and every allegation of paragraph 69.

25. Replying to the allegations of paragraph 70, these additional defendants admit that Sessel is a citizen of the State of Connecticut; that Sessel is, and at all times since 1955 has been, a Senior Vice President of Irving; that

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Noah Dietrich, an officer of Toolco, suggested in a letter to Ralph S. Damon, president of TWA, dated February 25, 1955, that Sessel be nominated as a director of TWA; that Sessel was originally elected a director of TWA, effective upon approval of the Civil Aeronautics Board at a meeting of the Board of Directors of TWA held on December 13, 1955; and that Sessel has at all times since March 1, 1956 been a director of TWA. Except as herein expressly admitted, these additional defendants deny each and every allegation of paragraph 70.

26. Replying to the allegations of paragraph 71, these additional defendants admit that this purported counterclaim is allegedly asserted derivatively in the right of TWA and its stockholders, that no demand to bring this claim was made on the directors or stockholders of TWA, and that more than 78.2% of the stock of TWA is held in a voting trust. These additional defendants further admit that demand would be futile, and allege that this counterclaim is without merit. Except as herein expressly admitted, these additional defendants deny each and every allegation of paragraph 71.

27. These additional defendants deny each and every allegation of paragraph 72.

28. These additional defendants deny each and [2659] every allegation of paragraphs 73, 74 and 75.

29. Replying to the allegations of paragraph 76, these additional defendants admit that, in 1960 and 1961, TWA entered into Note Purchase Agreements with Equitable

and Metropolitan and Loan Agreements with the banks named therein providing for the purchase by Equitable and Metropoiltan of an aggregate of $92,800,000 of Series A Sinking Fund Notes and an aggregate of $107,000,000 of Series B Sinking Fund Notes, and for the borrowing from banks of an aggregate of $72,200,000 on Series A Serial Notes and an additional $40,000,000 on Series B Serial Notes. Except as herein expressly admitted, these additional defendants deny each and every allegation of paragraph 76.

30. These additional defendants deny each and every allegation of paragraph 77.

31. Replying to the allegations of paragraph 78, these additional defendants admit the allegations contained in the first two sentences of said paragraph. These additional defendants further admit that, in 1956, Toolco placed orders for the acquisition of a fleet of jet aircraft from Boeing and General Dynamics Corporation ("General Dynamics") under contracts assignable to TWA, and allege that Toolco refused to assign any of these contracts to TWA before April 1960 and consistently maintained that Toolco was not committed to sell any of these aircraft to TWA and that TWA was not committed to buy any of them from Toolco. These additional defendants deny that they have knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in the last sentence of [2660] paragraph 78. Except as herein expressly admitted or denied, these additional defendants deny each and every allegation of paragraph 78.

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32. Replying to the allegations of paragraph 79, these additional defendants admit that Toolco's total commitments in connection with the purchase of jet aircraft and equipment exceeded $300,000,000. Except as herein expressly admitted, these additional defendants deny each and every allegation of paragraph 79.

33. Replying to the allegations of paragraph 80, these additional defendants admit that in 1956 Equitable was the holder of $40,000,000 principal amount of TWA's 3¾% Equipment Mortgage Sinking Fund Bonds due December 1, 1969. These additional defendants deny that they have knowledge or information sufficient to form a belief as to the truth of the allegations that lending institutions other than Irving entered into the understanding and agreement referred to in the second sentence of said paragraph. Except as herein expressly admitted or denied, these additional defendants deny each and every allegation of paragraph 80.

34. Replying to the allegations of paragraph 81 and of each subparagraph thereof, these additional defendants admit that Toolco had discussions with Equitable in 1958 with regard to the financing of TWA's jet equipment program. Except as herein expressly admitted, these additional defendants deny that they have knowledge or information sufficient to form a belief as to the truth of each and every allegation of paragraph 81 and of each subparagraph thereof.

[2661] 35. Replying to the allegations of paragraph 82, these additional defendants admit that in early 1959

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Dillon Read was retained to prepare plans for the permanent financing of the jet equipment program. Except as herein expressly admitted, these additional defendants deny that they have knowledge or information sufficient to form a belief as to the truth of each and every allegation of paragraph 82.

36. Replying to the allegations of paragraph 83, these additional defendants admit that a number of leasing plans were proposed which were not consummated. These additional defendants deny that they have knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in the last two sentences of paragraph 83. Except as herein expressly admitted or denied, these additional defendants deny each and every allegation of paragraph 83.

37. Replying to the allegations of paragraph 84, these additional defendants admit that early in 1959 Boeing commenced the delivery of jet aircraft ordered by Toolco; that, as such aircraft were received, they were placed in service by TWA under temporary leases; that the first of such jet aircraft was placed in transcontinental service by TWA in March 1959; and that, according to its annual reports, TWA realized earnings before taxes in excess of $17,400,000 in 1959 and in excess of $15,200,000 in 1960. Except as herein expressly admitted, these additional defendants deny that they have knowledge or information sufficient to form a belief as to the truth of each and every allegation of paragraph 84.

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38. Replying to the allegations of paragraph 85, [2662] these additional defendants admit that Toolco financed the acquisition of jet aircraft leased to TWA out of its own cash resources; that Toolco advised these additional defendants that its cash resources were all but exhausted; that Irving and other banks made various loans to Toolco to finance the acquisition of jet aircraft; that Irving informed Toolco in 1959 that it had exhausted its legal loan limit; and that, under the Loan Agreement dated as of December 23, 1954 between Toolco, the banks named therein and Irving, as agent, to which agreement reference is hereby made for a statement of the terms and provisions thereof, there were certain limitations upon additional borrowings by Toolco without the consent of the banks. Except as herein expressly admitted, these additional defendants deny each and every allegation of paragraph 85.

39. These additional defendants deny each and every allegation of paragraph 86 and of each subparagraph thereof.

40. Replying to the allegations of paragraph 87, these additional defendants admit that at various times during 1959 and 1960 Toolco, with the knowledge of TWA, entered into negotiations with aircraft manufacturers for assistance in the financing not only of jet aircraft then on order but also of additions thereto; that Irving learned of such negotiations early in 1960; that the payment of rentals due from TWA to Toolco under the leases of jet aircraft by Toolco to TWA could have been used by Toolco as a

source of moneys in making payments for jets thereafter to be delivered; and that Equitable declined to waive indenture provisions which prohibited TWA from making such payments. Except as herein expressly admitted, these additional de- [2663] fendants deny each and every allegation of paragraph 87.

41. Replying to the allegations of paragraph 88, these additional defendants admit that, in March 1960, TWA and Toolco agreed to support a financing plan later known as the Dillon Read Plan as set forth in memoranda dated March 16 and 17, 1960, and thereafter in various subsequent memoranda, to which reference is hereby made for a statement of the terms and provisions thereof; and that by memorandum dated March 24, 1960, and subsequent memoranda, to which reference is hereby made for a statement of the terms and provisions thereof, Equitable set forth its preliminary expression of its requirements to continue to negotiate for participation in the financing contemplated by the Dillon Read Plan. These additional defendants deny that they have knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in the last two sentences of paragraph 88. Except as herein expressly admitted or denied, these additional defendants deny each and every allegation of paragraph 88.

42. Replying to the allegations of paragraph 89, these additional defendants admit that Sessel, on behalf of Irving, advised TWA and Toolco that negotiations as to interest rate could not be conducted until a group of banks had indicated to TWA a willingness to consider favorably par-

ticipation in the financing and that, when such an agreement had been reached, the interest rate would be negotiated. These additional defendants deny that they have knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in the second, fourth [2664] and fifth sentences of paragraph 89. Except as herein expressly admitted or denied, these additional defendants deny each and every allegation of paragraph 89.

43. Replying to the allegations of paragraph 90, these additional defendants admit that, in May 1960, Equitable and Metropolitan approved in principle participation in the financing contemplated by the Dillon Read Plan, subject to various conditions; that, pursuant to the May 1960 Loan Agreement, to which reference is hereby made for a statement of the terms and provisions thereof, Irving and the other banks named therein agreed, among other things, to make interim loans to TWA of up to $40,000,000; that Toolco guaranteed the interim loans provided for under the May 1960 Loan Agreement and the Sinking Fund Bonds of TWA held by Equitable, the maturity of which was accelerated to the same date as that of the interim bank financing; that the maturity of such interim debt was fixed as the initial closing date under the Dillon Read Plan; that consideration was given to the possibility of a closing on May 31, 1960; that the closing was at one time scheduled for July 21, 1960 and that, prior to the execution and delivery of the May 1960 Loan Agreement, Irving knew that Charles S. Thomas ("Thomas"), TWA's then president, had discussed with various persons an employment arrangement with TWA which involved a salary increase and a

retirement annuity. Except as herein expressly admitted, these additional defendants deny each and every allegation of paragraph 90.

44. These additional defendants deny each and every allegation of paragraph 91 and of each subparagraph thereof.

[2665] 45. Replying to the allegations of paragraph 92, these additional defendants deny that they have knowledge or information sufficient to form a belief as to the truth of the allegations that Toolco refused to recommend to TWA the acceptance of Thomas' demands under pressure of the financing but itself offered Thomas equivalent benefits, and that Thomas insisted that his demands should be met by TWA. Except as herein expressly denied, these additional defendants deny each and every allegation of paragraph 92.

46. Replying to the allegations of paragraph 93, these additional defendants admit that, on July 21, 1960, Toolco advised representatives of certain of the insurance companies and banks that Thomas, having finished the two years of service to which he was committed, intended to resign; that Toolco proposed to the lenders that the financing proceed as planned upon the understanding that, if a president of TWA acceptable to the lenders had not been found within 90 days, Toolco would place its TWA stock in a voting trust under certain conditions; that Thomas resigned on July 27, 1960; and that Equitable and Metropolitan advised TWA that there had been an adverse change

in management and declined to proceed with the closing. These additional defendants deny that they have knowledge or information sufficient to form a belief as to the truth of the allegations that representatives of Metropolitan and Equitable tentatively accepted Toolco's proposal but that it was thereafter rejected, that the decision to reject the proposal was made jointly by Oates and Hagerty, that a compromise between Thomas and Toolco appeared probable, that Thomas consulted Oates and Hagerty, and that Oates and Hagerty advised [2666] Thomas not to accept any compromise but to resign. Except as herein expressly admitted or denied, these additional defendants deny each and every allegation of paragraph 93.

47. (a) Replying to the allegations of subparagraph 94(a), these additional defendants admit that Equitable and Metropolitan made certain proposals to TWA by letters dated July 28, 1960, to which reference is hereby made for a statement of the terms and provisions thereof; that Irving and the other banks who were parties to the May 1960 Loan Agreement agreed with TWA to enter into a Loan Agreement dated as of August 1, 1960, to which reference is hereby made for a statement of the terms and provisions thereof; and that the maturity of the TWA debt which Toolco had guaranteed was extended to September 1, 1960. Except as herein expressly admitted, these additional defendants deny each and every allegation of subparagraph 94(a).

(b) Replying to the allegations of subparagraph 94(b), these additional defendants admit that the extension of the

maturity of the interim bank debt was made on the conditions set forth in the Third Supplemental Loan Agreement dated as of August 1, 1960, to which reference is hereby made for a statement of the terms and provisions thereof. Except as herein expressly admitted, these additional defendants deny each and every allegation of subparagraph 94(b).

(c) Replying to the allegations of subparagraph 94(c), these additional defendants admit that representatives of Toolco suggested the names of certain persons as possible successors to Thomas as president of TWA. Except as herein expressly admitted, [2667] these additional defendants deny each and every allegation of subparagraph 94(c).

(d) Replying to the allegations of subparagraph 94(d), these additional defendants admit that Irving was requested by Toolco to formulate and implement a new financing plan, which would not require Toolco to place its TWA stock in a voting trust; that Irving refused to proceed to formulate such a plan unless and until it had adequate information from Toolco to put such a plan together; and that, during September 1960, Irving proceeded to develop the so-called Bank Plan dated September 26, 1960, to which reference is hereby made for a statement of the terms and provisions thereof. Except as herein expressly admitted, these additional defendants deny each and every allegation of subparagraph 94(d).

(e) These additional defendants deny each and every allegation of subparagraph 94(e).

(f) Replying to the allegations of subparagraph 94(f), these additional defendants admit that delay in the arrange-

ment of permanent financing would damage TWA. Except as herein expressly admitted, these additional defendants deny each and every allegation of subparagraph 94(f).

(g) Replying to the allegations of subparagraph 94(g), these additional defendants admit that Irving presented to Toolco the so-called Bank Plan dated September 26, 1960, which contemplated that General Dynamics would participate in the financing to the extent of $40,000,000, and that Toolco accepted [2668] such plan. These additional defendants deny that they have knowledge or information sufficient to form a belief as to the truth of the allegation that General Dynamics did not have the available resources to extend a $40,000,000 credit. Except as herein expressly admitted or denied, these additional defendants deny each and every allegation of subparagraph 94(g).

(h) Replying to the allegations of subparagraph 94(h), these additional defendants admit that Toolco submitted to Irving a letter dated October 5, 1960, to which reference is hereby made for a statement of the terms and provisions thereof, in which Toolco referred to the so-called Bank Plan dated September 26, 1960; that General Dynamics sought to obtain the approval of The Prudential Insurance Company of America ("Prudential") in order to supply the $40,000,000 credit contemplated in the so-called Bank Plan; that representatives of Prudential discussed the situation with representatives of one or more of the lenders; and that Prudential refused to give such approval. Except as herein expressly admitted, these additional defendants deny each and every allegation of subparagraph 94(h).

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(i) Replying to the allegations of subparagraph 94(i), these additional defendants admit that, on October 6, 1960, Irving and the other banks who were parties to the May 1960 Loan Agreement met to consider Toolco's proposal; that a representative of Equitable attended the meeting; that Sessel advised the banks that he had heard that Howard R. Hughes ("Hughes") had [2669] stated a voting trust would be preferable to receivership; and that Sessel, on behalf of the banks, informed the Toolco representatives that it was the position of the banks that (i) no loans would be made to TWA by the banks without a voting trust, (ii) the banks would proceed with the Dillon Read Plan if the insurance companies would also do so, (iii) the banks would set off their TWA balances against their TWA loans at the end of the day unless the Dillon Read Plan with a voting trust was accepted by Toolco, and (iv) the decision of the banks was final, would not be reopened and an answer would be required by 5 P. M., Eastern Daylight Saving Time, on that date. Except as herein expressly admitted, these additional defendants deny each and every allegation of subparagraph 94(i).

(j) Replying to the allegations of subparagraph 94(j), these additional defendants admit that in mid-afternoon Toolco's representatives were called into the October 6, 1960 meeting; that Sessel, on behalf of the banks, stated to the Toolco representatives that Toolco's proposal was unacceptable and that there was nothing further to discuss about it; that Sessel, on behalf of the banks, further stated that the banking group would not care to participate in any financing plan for TWA which did not require Toolco to place its TWA stock in a voting trust; that Sessel, on behalf

of the banks further stated that, in view of the substantial loans outstanding, both on the part of TWA and Toolco, which under the circumstances could only be [2670] paid in connection with an overall financing plan, it was the banks' position that before 5 P. M., Eastern Daylight Saving Time, that afternoon, Toolco would have to agree by written document executed by its then president, Hughes, to accept the Dillon Read Plan with a voting trust; that Sessel, on behalf of the banks, also pointed out that the consequences of a failure to adopt a plan might be a receivership, both for TWA and Toolco; and that Sessel further stated that, unless a plan were adopted, Irving would have to collect a substantial indebtedness owed to Irving by Hughes personally, which would become due by its terms on October 31, 1960, but the maturity of which could be accelerated, and to proceed immediately to realize upon Hughes' stock in Toolco, which had been pledged as security for Hughes' debt to Irving, since, in Irving's opinion, Toolco at that time was insolvent. Except as herein expressly admitted, these additional defendants deny each and every allegation of subparagraph 94(j).

(k) Replying to the allegations of subparagraph 94(k), these additional defendants admit that Toolco, in a letter dated October 6, 1960, to which reference is hereby made for a statement of the terms and provisions thereof, agreed to place its TWA stock in a voting trust on the conditions set forth therein; and that Irving and the other banks agreed that TWA be given the right to refund without premium or penalty the senior indebtedness to be provided by them to TWA. Except as herein expressly

admitted, these additional [2671] defendants deny each and every allegation of subparagraph 94(k).

(l) Replying to the allegations of subparagraph 94(l), these additional defendants admit that Metropolitan expressed its willingness to permit Toolco to have the right to purchase the insurance company debt upon payment of a premium to be initially 22% of the principal amount of such debt, (i.e., $20,416,000), plus accrued interest. Except as herein expressly admitted, these additional defendants deny each and every allegation of subparagraph 94(l).

(m) Replying to the allegations of subparagraph 94(m), these additional defendants admit that Toolco submitted to Equitable an alternative proposal in a letter dated October 17, 1960, to which reference is hereby made for a statement of the terms and provisions thereof; and that Irving found the proposal to be unacceptable. Except as herein expressly admitted, these additional defendants deny each and every allegation of subparagraph 94(m).

(n) Replying to the allegations of subparagraph 94(n), these additional defendants admit that Equitable and Metropolitan, in letters dated October 19, 1960, to which reference is hereby made for a statement of the terms and provisions thereof, stated to Toolco and TWA their willingness to reinstate the Dillon Read Plan on certain conditions. Except as herein expressly admitted, these additional defendants deny each and every allegation of subparagraph 94(n).

[2672] (o) Replying to the allegations of subparagraph 94(o), these additional defendants admit that Irving,

as agent, made a similar proposal to Toolco by letter dated October 19, 1960, to which reference is hereby made for a statement of the terms and provisions thereof. Except as herein expressly admitted, these additional defendants deny each and every allegation of subparagraph 94(o).

(p) Replying to the allegations of subparagraph 94(p), these additional defendants deny that they have knowledge or information sufficient to form a belief as to the truth of the allegation that Toolco endeavored to negotiate a reduction of the premium. Except as herein expressly denied, these additional defendants deny each and every allegation of subparagraph 94(p).

(q) Replying to the allegations of subparagraph 94(q), these additional defendants admit that Toolco delivered to Sessel a letter addressed to Irving relating to the October 19 proposals dated October 22, 1960, to which reference is hereby made for a statement of the terms and provisions thereof; that, on October 24, 1960, Irving and the other banks who were parties to the May 1960 Loan Agreement commenced offsetting TWA balances against TWA's debt to such banks; and that there were reports in the press with respect to the position taken by Toolco in its letter dated October 22, 1960. Except as herein expressly admitted, these additional defendants deny each and every allegation of subparagraph 94(q).

[2673] (r) Replying to the allegations of subparagraph 94(r), these additional defendants admit that Toolco claimed it was endeavoring to develop an alternative plan for financing TWA's requirements; that Toolco's efforts, if

any, to develop such a plan were unsuccessful; and that Toolco and TWA, by letters dated November 30, 1960, to which reference is hereby made for a statement of the terms and provisions thereof, offered to proceed to put the Dillon Read Plan into effect on certain conditions. Except as herein expressly admitted, these additional defendants deny each and every allegation of subparagraph 94(r).

Except as herein expressly admitted or denied, these additional defendants deny each and every allegation of paragraph 94.

48. Replying to the allegations of paragraph 95, these additional defendants admit that, in December 1960, the necessary transactions and agreements to effectuate the Dillon Read Plan and to place the common stock of TWA owned by Toolco in the voting trust provided for in the Dillon Read Plan were effected. Except as herein expressly admitted, these additional defendants deny each and every allegation of paragraph 95.

49. (a) Replying to the allegations of subparagraph 96(a), these additional defendants admit that meetings of TWA stockholders were held on February 28, 1961 and April 27, 1961, at which directors of TWA were elected; that Raymond M. Holliday is a voting trustee named by Toolco; and that Breech was elected chairman [2674] of TWA's Board of Directors. Except as herein expressly admitted, these additional defendants deny each and every allegation of subparagraph 96(a).

(b) Replying to the allegations of subparagraph 96(b), these additional defendants admit that Tillinghast was

elected by TWA's Board of Directors to be the president and chief executive officer of TWA; and that Tillinghast entered into an employment contract with TWA, to which reference is hereby made for a statement of the terms and provisions thereof. Except as herein expressly admitted, these additional defendants deny each and every allegation of subparagraph 96(b).

(c) Replying to the allegations of subparagraph 96(c), these additional defendants admit that, partly because of TWA's route structure, the traffic on its routes for many years decreased in the winter months; that Toolco in 1960 entered into negotiations with Atlas Corporation, the controlling stockholder of Northeast Airlines, Inc. ("Northeast"), looking toward a merger of Northeast with and into TWA; that Northeast, partly by reason of its east coast route to Florida, has a seasonal imbalance which is the reverse of that of TWA; that such negotiations culminated in May 1960 in an agreement of merger, to which reference is hereby made for a statement of the terms and provisions thereof, which Atlas Corporation and Toolco agreed to recommend to the Board of Directors of Northeast and TWA, respectively; that Breech and Olds did not recom- [2675] mend the merger to the TWA Board of Directors; and that the merger was not consummated, notwithstanding a suggestion made by Toolco in a letter dated May 26, 1961, to which reference is hereby made for a statement of the terms and provisions thereof. These additional defendants deny that they have knowledge or information sufficient to form a belief as to the truth of the allegations that Toolco's negotiations with Atlas Corpora-

tion were to remedy TWA's seasonal imbalance, that such negotiations were carried on with the knowledge of TWA, and that Breech and Olds failed to recommend the merger to the TWA Board of Directors with full knowledge of the agreement made by Toolco with Atlas Corporation. Except as herein expressly admitted or denied, these additional defendants deny each and every allegation of subparagraph 96(c).

(d) Replying to the allegations of subparagraph 96(d), these additional defendants admit that the Board of Directors of TWA refused to grant Toolco's request for a one week's postponement in an offering by TWA of $111,235,900 principal amount of subordinated debentures with warrants attached, which offering was being made to TWA's stockholders pursuant to agreements made in December 1960, to which reference is hereby made for a statement of the terms and provisions thereof; and that a secondary offering of both the debentures which Toolco was obligated to purchase and those which it had the option to purchase, if successfully consummated, would have permitted TWA to obtain an ad- [2676] ditional $11,235,900 in junior capital and Toolco to obtain $100,000,000 in cash. These additional defendants deny that they have knowledge or information sufficient to form a belief as to the truth of the allegation that Toolco desired a postponement of the offering in order that it might make a simultaneous secondary offering of both the debentures which it was obligated to purchase and those which it had the option to purchase. Except as herein expressly admitted or denied, these additional defendants deny each and every allegation of subparagraph 96(d).

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(e) Replying to the allegations of subparagraph 96(e), these additional defendants admit that TWA entered into agreements with Boeing for the purchase of additional jet equipment from Boeing, having a total cost in excess of $187,500,000. Except as herein expressly admitted, these additional defendants deny each and every allegation of subparagraph 96(e).

(f) Replying to the allegations of subparagraph 96(f), these additional defendants admit that Toolco made certain proposals to TWA in its letter dated June 10, 1961, to which reference is hereby made for a statement of the terms and provisions thereof; and that such proposals were not accepted. Except as herein expressly admitted, these additional defendants deny each and every allegation of subparagraph 96(f).

(g) These additional defendants deny each and every allegation of subparagraph 96(g).

(h) Replying to the allegations of subpara- [2677] graph 96(h), these additional defendants admit that, in August 1961, TWA entered into Note Purchase and Loan Agreements dated as of July 1, 1961, for the supplying of $147,000,000 of additional financing to TWA, and TWA entered into a First Supplemental Indenture dated as of July 1, 1961, to which agreements and indenture reference is hereby made for a statement of the terms and provisions thereof. These additional defendants further admit that TWA entered into such agreements and indenture without the approval by or consultation with Toolco or approval by the other stockholders of TWA, and allege that no such approval or consultation was required. Except as herein expressly admitted, these additional defendants deny each and every allegation of subparagraph 96(h).

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Except as herein expressly admitted or denied, these additional defendants deny each and every allegation of paragraph 96.

50. Replying to the allegations of paragraph 97, these additional defendants admit that Toolco nominated a majority of the directors of TWA from 1947 through 1960, and, on the basis of TWA's annual reports, admit the allegations contained in the second, third and fourth sentences of said paragraph. Except as herein expressly admitted, these additional defendants deny each and every allegation of paragraph 97.

51. Replying to the allegations of paragraph 98 and of each subparagraph thereof, these additional defendants admit that TWA's reported 1961 losses before various tax credits, accelerated depreciation and write-offs were in [2678] excess of $27,000,000; and that TWA's September 1961 financial review, to which reference is hereby made for the contents thereof, contained certain estimates with respect to TWA's cash position. Except as herein expressly admitted, these additional defendants deny each and every allegation of paragraph 98 and of each subparagraph thereof.

52. These additional defendants deny each and every allegation of paragraphs 99, 100 and 101.

WITH RESPECT TO THE FOURTH COUNTERCLAIM

53. Replying to the allegations of paragraph 102, these additional defendants repeat and reallege with the same force and effect as if herein set forth in full each and every allegation contained in paragraphs 1 through 7, inclusive, 19, 24, 25 and 28 through 50, inclusive, of this reply.

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54. These additional defendants deny each and every allegation of paragraphs 103, 104, 105, 106, 107 and 108.

WITH RESPECT TO THE FIFTH COUNTERCLAIM

55. Replying to the allegations of paragraph 109, these additional defendants repeat and reallege with the same force and effect as if herein set forth in full each and every allegation contained in paragraphs 1 through 7, inclusive, 19, 24, 25 and 31 through 50, inclusive, of this reply.

56. These additional defendants deny each and every allegation of paragraphs 110, 111 and 112.

57. Replying to the allegations of paragraph 113, these additional defendants admit the existence of Section 218 of the Delaware Corporation Law, to which reference is [2679] hereby made for a statement of the terms and provisions thereof; and further admit that, in December 1960, Toolco executed the Option Agreement and the Voting Trust Agreement, to which reference is hereby made for a statement of the terms and provisions thereof. Except as herein expressly admitted, these additional defendants deny each and every allegation of paragraph 113.

58. These additional defendants deny each and every allegation of paragraphs 114, 115, 116 and 117.

FOR A FIRST SEPARATE, AFFIRMATIVE AND COMPLETE DEFENSE BY IRVING TO THE FIRST THROUGH FIFTH COUNTERCLAIMS ALLEGED IN THE ANSWER, AND BY SESSEL TO THE THIRD, FOURTH AND FIFTH COUNTERCLAIMS:

59. The counterclaims, and each of them, fail to state a claim upon which relief can be granted.

Reply of Additional Defendants Irving Trust Company and Ben-Fleming Sessel to Counterclaims, January 25, 1963

FOR A SECOND SEPARATE, AFFIRMATIVE AND COMPLETE DEFENSE BY IRVING TO THE FIRST THROUGH FIFTH COUNTERCLAIMS ALLEGED IN THE ANSWER, AND BY SESSEL TO THE THIRD, FOURTH AND FIFTH COUNTERCLAIMS:

60. In December 1960, Toolco, pursuant to authorization duly given by its Board of Directors, entered into the Voting Trust Agreement and the Option Agreement, which documents were executed on Toolco's behalf by its duly authorized officers, and Toolco consented and agreed to all of the terms thereof.

61. As contemplated by the Voting Trust Agreement, and pursuant to its terms, Toolco proceeded to place the shares of TWA stock which it owned in a voting trust under the Voting Trust Agreement.

[2680] 62. Toolco executed the Voting Trust Agreement and Option Agreement, and placed the shares of TWA stock which it owned in the voting trust, in order that TWA could obtain loans from financial institutions, including Irving, which TWA needed in connection with its business.

63. At that time, Toolco itself was unwilling and/or unable to provide said loans to TWA, and Toolco and Hughes, its then president, had delayed for months the task of making arrangements to supply the senior financing for TWA which was necessary for the acquisition of jet flight equipment, and which previously could have been obtained without Toolco's agreement to a voting trust prior to the supplying of such financing.

Reply of Additional Defendants Irving Trust Company and Ben-Fleming Sessel to Counterclaims, January 25, 1963

64. In December 1960, it was the business judgment of the financial institutions (including Irving) which had been asked by Toolco and TWA to supply financing to TWA that they would not be willing to assume the risk of supplying such financing in the absence of a voting trust arrangement designed to ensure capable and continuous management, because of their prior experience with Toolco and Hughes and their lack of confidence in the financial stability and prospects of TWA if under the domination and control of Toolco and Hughes.

65. At that time Toolco was fully aware of the position of the lenders and the reasons therefor.

66. Toolco participated as a proponent in proceedings before the Civil Aeronautics Board which culminated in the Board's approval on December 29, 1960 (Order No. E-16195) of certain transactions between Toolco and TWA [2681] involved in the financing and of certain relationships of the voting trustees under the Voting Trust Agreement.

67. In 1960 and 1961, on the basis of Toolco's execution of the Voting Trust Agreement and the Option Agreement, and the deposit of the shares of TWA stock which Toolco owned in the voting trust, Metropolitan and Equitable purchased $92,800,000 principal amount of TWA's 6½% Equipment Mortgage Sinking Fund Notes due December 31, 1972, and a group of banks, including Irving and for which Irving acted as agent, loaned to TWA $72,200,000, evidenced by TWA's 6% Equipment Mortgage Serial Notes due December 31, 1961-December 31, 1964.

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68. Toolco, as the owner of over 78% of the common stock of TWA, benefited from the making of these loans to TWA, since TWA was thereby enabled to finance its program for the acquisition of jet flight equipment.

69. Having consented to, participated in, and benefited from that of which it now complains, and having induced Irving and the other financial institutions to rely upon Toolco's acts to their detriment, Toolco is barred and estopped by its prior conduct from asserting and prosecuting the counterclaims alleged against Irving and Sessel, and each of such counterclaims, either on Toolco's own behalf or derivatively on behalf of TWA.

FOR A THIRD, SEPARATE, AFFIRMATIVE AND COMPLETE DEFENSE BY IRVING TO THE FIRST THROUGH FIFTH COUNTERCLAIMS ALLEGED IN THE ANSWER, AND BY SESSEL TO THE THIRD, FOURTH AND FIFTH COUNTERCLAIMS:

70. These additional defendants repeat and re- [2682] allege with the same force and effect as if herein set forth in full each and every allegation contained in paragraphs 60 through 68, inclusive, of this reply.

71. In August 1961, Metropolitan and Equitable agreed to purchase, subject to certain conditions, an aggregate of $107,000,000 principal amount of TWA's 6% Equipment Mortgage Sinking Fund Notes, Series B, due December 31, 1977, and a group of banks, including Irving and for which Irving acted as agent, agreed to lend to TWA, subject to certain conditions, an aggregate of

$40,000,000, to be evidenced by TWA's 5½% Equipment Mortgage Serial Notes, Series B, maturing serially on December 31, 1963 and annually thereafter through December 31, 1966.

72. Irving and other of the financial institutions would not have agreed to supply such financing in August 1961 if the common stock of TWA owned by Toolco were not at that time in the voting trust under the Voting Trust Agreement.

73. When Toolco entered into the Voting Trust Agreement, it knew or should have known that TWA would need additional flight equipment, that additional outside financing would be required in order to obtain such equipment, and that Irving and other financial institutions would not assume the risk of supplying such additional financing unless the common stock of TWA owned by Toolco were in the voting trust under the Voting Trust Agreement.

74. The supplying of such additional financing benefited TWA and Toolco as the owner of over 78% of TWA's common stock.

[2683] 75. Having consented to, participated in, and benefited from that of which it now complains, and having induced Irving and the other financial institutions to rely upon Toolco's acts to their detriment, Toolco is barred and estopped by its prior conduct from asserting and prosecuting the counterclaims alleged against Irving and Sessel, and each of such counterclaims, either on Toolco's own behalf or derivatively on behalf of TWA.

Reply of Additional Defendants Irving Trust Company and Ben-Fleming Sessel to Counterclaims, January 25, 1963

FOR A FOURTH SEPARATE, AFFIRMATIVE AND COMPLETE DEFENSE BY IRVING TO THE FIRST THROUGH FIFTH COUNTERCLAIMS ALLEGED IN THE ANSWER, AND BY SESSEL TO THE THIRD, FOURTH AND FIFTH COUNTERCLAIMS:

76. These additional defendants repeat and reallege with the same force and effect as if herein set forth in full each and every allegation contained in paragraphs 60 through 68, inclusive, and 71 through 74, inclusive, of this reply.

77. Toolco is barred by its own unclean hands from asserting and proseduting the counterclaims alleged against Irving and Sessel, and each of such counterclaims, either on Toolco's own behalf or derivatively on behalf of TWA.

FOR A FIFTH SEPARATE, AFFIRMATIVE AND COMPLETE DEFENSE BY IRVING TO THE FIRST THROUGH FIFTH COUNTERCLAIMS ALLEGED IN THE ANSWER, AND BY SESSEL TO THE THIRD, FOURTH AND FIFTH COUNTERCLAIMS:

78. Toolco may not seek rescission of the Voting Trust Agreement or of the voting trust provided for therein, because it is not offered to tender back the benefits received in connection therewith.

[2684] FOR A SIXTH SEPARATE, AFFIRMATIVE AND COMPLETE DEFENSE BY IRVING TO THE SECOND COUNTERCLAIM ALLEGED IN THE ANSWER:

79. This Court lacks jurisdiction over the subject matter of the Second counterclaim.

Reply of Additional Defendants Irving Trust Company and Ben-Fleming Sessel to Counterclaims, January 25, 1963

FOR A SEVENTH SEPARATE, AFFIRMATIVE AND COMPLETE DEFENSE BY IRVING TO THE SECOND COUNTERCLAIM ALLEGED IN THE ANSWER:

80. Toolco has no standing to prosecute in this Court a claim based on alleged violations of Section 408 of the Federal Aviation Act of 1958.

WHEREFORE, additional defendants Irving and Sessel demand judgment dismissing the counterclaims, with prejudice, together with their costs and disbursements.

January 25, 1963.

WINTHROP, STIMSON, PUTNAM & ROBERTS

By WILLIAM C. CHANLER
A Member of the Firm
Attorneys for Additional Defendants
Irving Trust Company and
Ben-Fleming Sessel
40 Wall Street
New York 5, New York
WHitehall 3-0700

Reply of Additional Defendant Dillon, Read & Co. Inc. to Counterclaims, February 5, 1963

[3756]

[CAPTION]

Additional Defendant Dillon, Read & Co. Inc. ("Dillon Read"), for its reply to the purported counterclaims of defendant Hughes Tool Company ("Toolco") against Dillon Read, states as follows:

WITH RESPECT TO THE FIRST COUNTERCLAIM

1. Admits the allegations of paragraphs 42 and 47.

2. Denies each and every allegation contained in paragraphs 49, 54, 56, 57, 58, and 59.

3. Admits the allegations of paragraph 43, except denies that it has knowledge or information sufficient to form a belief with respect to the truth of the allegations [3757] contained in the second sentence thereof.

4. Denies that it has knowledge or information sufficient to form a belief with respect to the truth of each and every allegation of paragraph 44, except: (a) admits the allegations contained in the first three sentences thereof; (b) admits that The Equitable Life Assurance Society of the United States ("Equitable") has held certain indebtedness of Trans World Airlines, Inc. ("TWA") from 1947 to the present; (c) admits that Metropolitan Life Insurance Company ("Metropolitan") has held certain indebtedness of TWA since December, 1960.

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5. Denies that it has knowledge or information sufficient to form a belief with respect to the truth of each and every allegation of paragraph 45, except: (a) admits the allegations contained in the first sentence thereof; (b) admits that Irving Trust Company ("Irving") has been one of TWA's principal commercial bankers, and that it and other lending institutions have made loans to TWA.

6. Denies that it has knowledge or information sufficient to form a belief with respect to the truth of each and every allegation of paragraph 46, except admits: (a) that Ernest R. Breech ("Breech") was from December, 1960, until his resignation on or about January 26, 1962, one of two voting trustees selected by certain noteholders, including Metropolitan and Equitable, under a Noteholder's Agreement dated as of December 1, 1960, to which reference is made for the terms and provisions thereof; to act as a voting trustee under a Voting Trust Agreement dated as of December 15, 1960, to which reference is made for the terms and provisions thereof; (b) that Breech is and at all times since April 27, 1961, has been the Chairman of the Board of Directors of TWA.

[3758] 7. Denies each and every allegation of paragraph 48, except admits that Dillon Read is a corporation with its principal place of business in the City of New York, that it is engaged in the investment banking business, and since January, 1959, has rendered financial services to TWA.

8. Denies each and every allegation of paragraph 50, except admits: (a) that following the resignation in

July, 1960, of TWA's then president, Charles Thomas ("Thomas"), Equitable and Metropolitan and a group of commercial banks, including Irving, offered to purchase certain long-term indebtedness of TWA on condition that Toolco place all shares of TWA stock which it owned in a voting trust; (b) that in part such financing was to provide TWA with funds with which to acquire jet aircraft; (c) that Toolco in a letter dated November 30, 1960, agreed to place all shares of TWA stock which it owned in a voting trust, subject to certain conditions stated therein, and that reference is made to said letter for the terms and provisions thereof.

9. Denies each and every allegation of paragraph 51, except admits: (a) that in December, 1960, Equitable and Metropolitan purchased a total of $92,800,000 principal amount of TWA's 6½% Equipment Mortgage Sinking Fund Notes due December 31, 1972, and TWA borrowed $72,200,000 from Irving and associated banks, evidenced by 6% Equipment Mortgage Serial Notes due December 31, 1961—December 31, 1964; (b) that Toolco, TWA, Equitable, Metropolitan, Irving, and others entered into a series of transactions and agreements whereby the 5,221,301 shares of TWA common stock then held by Toolco were placed in a voting trust, and refers to the aforementioned voting trust agreement and the other agreements referred to therein for the terms and provisions thereof; and (c) that Breech and Irving Olds "Olds") were [3759] selected by the Noteholders under the aforementioned Noteholders Agreement, including Equitable and Metropolitan, as two of the three voting trustees with respect to said stock.

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10. Denies each and every allegation of paragraph 52, except admits the existence of the aforesaid Voting Trust Agreement and the by-laws of TWA and refers to the terms and provisions thereof.

11. Denies each and every allegation of paragraph 53, except as follows:

(a) Denies each and every allegation of subparagraph (a) thereof, except (1) admits that the TWA Board of Directors elected Tillinghast as President effective in April, 1961, and (2) denies that it has knowledge or information sufficient to form a belief as to the truth of the allegations with respect to Tillinghast's consultations, or prior employment.

(b) Denies that it has knowledge or information sufficient to form a belief as to the truth of each and every allegation of subparagraph (b) thereof, except admits that TWA entered into an employment contract with Tillinghast and refers thereto for the terms and conditions thereof.

(c) Denies each and every allegation of subparagraph (c) thereof, except (1) admits that TWA entered into certain agreements with Boeing for the purchase of additional jet aircraft required by TWA; that the aggregate cost of such jet aircraft and related equipment was in excess of $187,500,000; and that TWA proposed to enter into agreements with Metropolitan, Equitable and Irving and its associated banks to supply a total of approximately $147,000,000 in financing to TWA; and (2) admits that Dillon Read rendered financial services to TWA in connection with such financing.

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[3760] (d) Denies that it has knowledge or information sufficient to form a belief as to the truth of each and every allegation of subparagraph (d) thereof, except admits that in May, 1961, Toolco addressed certain communications to TWA, the voting trustees, and Equitable with regard to the negotiations leading up to the agreements referred to above, and refers thereto for the terms and provisions thereof.

(e) Denies each and every allegation of subparagraph (e), except (1) admits that TWA entered into agreements with Metropolitan and Equitable and with Irving and its associated banks for the supplying of approximately $147,000,000 of additional financing to TWA and refers to such agreements for the terms and provisions thereof; and (2) denies having any knowledge or information sufficient to form a belief with respect to the truth of the allegation that neither TWA nor any of the lending institutions sought or obtained the consent of Toolco to such agreements.

12. Denies each and every allegation of paragraph 55, except admits that Dillon Read received payments for its services in connection with TWA's 1961 financing.

WITH RESPECT TO THE THIRD COUNTERCLAIM

13. Denies each and every allegation contained in paragraphs 72, 73, 74, 75, 77, 86, 91, 99, 100 and 101 thereof.

14. With respect to paragraph 68 thereof, repeats and realleges its responses to paragraphs 42 through 48 thereof, inclusive, and 50 through 55 thereof, inclusive; as to para-

graph 62 thereof, denies each and every allegation thereof, except that it denies that it has knowledge or information sufficient to form a belief with respect to the [3761] truth of each and every allegation contained in the last sentence of subparagraph (a), and each and every allegation of subparagraphs (b), (c), (d), and (e) of said paragraph 62.

15. Denies that it has knowledge or information sufficient to form a belief with respect to the truth of each and every allegation of paragraph 69, except admits (a) that James F. Oates, Jr. ("Oates") has been the president of Equitable since 1955, and (b) that Harry C. Hagerty ("Hagerty") was the Vice Chairman of the Board of Directors of Metropolitan from 1955 until December 31, 1961.

16. Denies that it has knowledge or information sufficient to form a belief with respect to the truth of each and every allegation of paragraph 70, except admits that Ben-Fleming Sessel ("Sessel") has been the Senior Vice President of Irving and a director of TWA since 1955.

17. Denies each and every allegation of paragraph 71, except (1) that it denies that it has knowledge or information sufficient to form a belief with respect to the truth of the allegation that Toolco has made no demand upon the directors or the stockholders of TWA to bring this claim; and (2) admits that approximately 78.2% of TWA's common stock is held in the Voting Trust.

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18. Denies each and every allegation of paragraph 76, except admits that in 1960 Equitable, Metropolitan and Irving and certain banks supplied to TWA $165 million in financing and that in 1961, Equitable, Metropolitan and Irving and certain banks, supplied to TWA $147 million in financing and refers to the financing agreements for the terms and provisions thereof.

[3762] 19. Denies that it has any knowledge or information sufficient to form a belief as to the truth of each and every allegation of paragraph 78 thereof, except that from time to time Toolco has invested funds in TWA; that in 1955 it was necessary in order to maintain TWA's competitive position to arrange promptly for the acquisition and financing of jet-powered aircraft; and that Toolco thereafter placed certain orders for jet-powered aircraft with Boeing Airplane Company ("Boeing") and General Dynamics Corporation ("General Dynamics").

20. Denies each and every allegation of paragraph 79, except denies that it has knowledge or information sufficient to form a belief with respect to the truth of the first and second sentences thereof.

21. Denies each and every allegation of paragraph 80, except admits that Equitable held $40 million in principal amount of TWA's 3¾% Equipment Mortgage Sinking Fund Bonds by 1956.

22. Denies that it has knowledge or information sufficient to form a belief with respect to the truth of each and every allegation of paragraph 81, except admits that dis-

cussions had been held between Toolco and Equitable prior to 1959.

23. Denies each and every allegation of paragraph 82, except (a) admits that Dillon Read was retained to prepare plans for the permanent financing of jet equipment for TWA in early 1959 and (b) admits that Dillon Read advised Toolco and TWA that Equitable's support and participation was highly desirable in any permanent financing plan, and (c) denies that it has knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in the first sentence thereof.

[3763] 24. Denies each and every allegation of paragraph 83, except admits that Dillon Read undertook to and did develop a proposal for permanent financing through a leasing arrangement, and the proposal was not accepted.

25. Denies each and every allegation of paragraph 84, except admits that (a) Boeing commenced the delivery of jet aircraft ordered by Toolco which, when leased by Toolco to TWA, were placed in service by TWA in 1959, and (b) TWA realized earnings before taxes in excess of $17.4 million in 1959 and in excess of $15.2 million in 1960.

26. Denies that it has knowledge or information sufficient to form a belief with respect to the truth of each and every allegation of paragraph 85, except admits that Irving and other banks and Toolco participated in financing the acquisition of certain jet aircraft used by TWA.

27. Denies each and every allegation of paragraph 87, except (1) denies that it has knowledge or information

sufficient to form a belief as to the truth of the first three sentences thereof, and (2) admits that the indenture relating to TWA's then indebtedness to Equitable prohibited such rental payments and Equitable declined to waive such provision.

28. Denies each and every allegation of paragraph 88, except admits that (a) TWA and Toolco agreed to support a financing plan, later known as the "Dillon Read Plan" as set forth in memoranda dated March 16, 1960, and thereafter in various subsequent memoranda, and reference is made to such memoranda for the terms and provisions thereof, and (b) Equitable set forth its preliminary expression of its requirements in a memorandum dated March 24, 1960, and in [3764] subsequent memoranda and reference is made to such memoranda for the terms and provisions thereof; and (c) Dillon Read advised Toolco that the "Dillon Read Plan" was in the best interests of TWA; and (a) Toolco agreed to accept the "Dillon Read Plan" on or about March 28, 1960.

29. Denies each and every allegation of paragraph 89, except (1) denies having any knowledge or information sufficient to form a belief with respect to the truth of the third, fourth, fifth, sixth and seventh sentences thereof, and (2) admits that in April, 1960, Irving undertook to form a banking group for the purpose of providing interim and other financing for TWA.

30. Denies each and every allegation of paragraph 90, except admits that (a) in May, 1960, Equitable and Metro-

politan approved in principle participation in the financing contemplated by the Dillon Read Plan; (b) pursuant to the May, 1960, Loan Agreement, to which reference is made for the terms and provisions thereof, Irving and other banks agreed to make interim loans to TWA of up to $40,000,000; (c) Toolco guaranteed the interim loans provided for under the May, 1960, Loan Agreement and the Sinking Fund Bonds of TWA held by Equitable, the maturity of which was accelerated to the same date as that of the interim bank financing; (d) the maturity of such interim debt was fixed as the initial closing date under the Dillon Read Plan; (e) consideration was given to the possibility of a closing on May 16, 1960, and various dates thereafter; (f) Dillon Read believes that Thomas had discussed with various persons, including Howard R. Hughes, the terms of his employment arrangement with TWA and that such discussions were held prior to the execution and delivery of the May, 1960, Loan Agreement.

[3765] 31. Denies each and every allegation of paragraph 92, except denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations that Toolco refused to recommend to TWA the acceptance of Thomas' demands under pressure of the financing but itself offered Thomas equivalent benefits, and that Thomas insisted that his demands should be met by TWA.

32. Denies each and every allegation of paragraph 93, except (1) admits that (a) on July 21, 1960, Toolco advised representatives of certain lending institutions that

Thomas, having finished the two years of service to which he was committed, intended to resign; (b) that notwithstanding such imminent resignation, Toolco proposed to the lenders that the financing proceed as planned with the understanding that Toolco would place its stock in a voting trust made under certain conditions; (c) Thomas resigned on July 27, 1960; (d) Equitable and Metropolitan advised TWA that there was a materially adverse change in TWA's management and the lending institutions declined to proceed with the closing; (2) denies that it has knowledge or information sufficient to form a belief as to the truth of the allegations contained in the fourth, sixth and seventh sentences of said paragraph 93.

33. Denies each and every allegation of paragraph 94, except as follows:

(a) Denies each and every allegation of subparagraph (a) thereof, except admits that Equitable and Metropolitan made certain proposals to TWA by letter dated July 28, 1960, to which reference is made for the terms and provisions thereof, and that the maturity of the TWA debt which Toolco had guaranteed was extended to September 1, 1960.

(b) Denies that it has knowledge or information [3766] sufficient to form a belief as to the truth of each and every allegation of subparagraph (b) thereof.

(c) Denies each and every allegation of subparagraph (c) thereof, except admits that Hughes and other representatives of Toolco suggested the names of certain per-

sons whom they indicated would be acceptable to Hughes as possible successors to Thomas as President of TWA.

(d) and (e) Denies that it has knowledge or information sufficient to form a belief as to the truth of each and every allegation of subparagraph (d) and (e) thereof, except admits that Irving was requested to formulate and implement a new financing plan.

(f) Denies each and every allegation of subparagraph (f) thereof, except admits that a delay in the arrangement of permanent financing for jet aircraft would damage TWA.

(g) and (h) Denies that it has knowledge or information sufficient to form a belief as to the truth of each and every allegation of subparagraphs (g) and (h) thereof, except (1) admits that Irving presented to Toolco the so-called Bank Plan dated September 26, 1960, and Toolco sent letters to Irving dated September 27, 1960, and October 5, 1960, to which reference is made for the terms and provisions thereof; and (2) denies each and every allegation insofar as a conspiracy is alleged.

(i) and (j) Denies that it has any knowledge or information sufficient to form a belief as to the truth of each and every allegation of subparagraphs (i) and (j) thereof.

(k) Denies that it has any knowledge or information sufficient to form a belief as to each and every allegation of subparagraph (k) thereof, except admits that a letter dated October 6, 1960, was sent from Hughes to Irving. [3767] to which reference is made for the terms and provisions

thereof, in which Toolco agreed to place its TWA stock in a voting trust under certain conditions set forth therein.

(l) Denies each and every allegation of subparagraph (l) thereof, except admits that Metropolitan expressed its willingness to permit Toolco to purchase the insurance company debt prior to maturity upon payment of a premium to be initially 22% of the principal amount plus accrued interest.

(m) Denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph (m) thereof, except admits that Toolco submitted a proposal to Equitable by letter dated October 17, 1960, to which reference is made for the terms and provisions thereof, and that such proposal was not accepted by Irving and other banks.

(n) Denies each and every allegation of subparagraph (n), except admits that Equitable and Metropolitan advised Toolco by letter dated October 19, 1960, to which reference is made for the terms and provisions thereof, of the terms on which each of them would be willing to participate in the financing contemplated by the Dillon Read Plan.

(o) Denies that it has knowledge or information sufficient to form a belief as to each and every allegation of subparagraph (o) thereof, except admits that Irving sent a letter to Toolco dated October 19, 1960, to which reference is made for the terms and provisions thereof.

(p) Denies that it has any knowledge or information sufficient to form a belief as to the truth of each and every

allegation of subparagraph (p) thereof, except (a) admits that the acceptance of the provisions of the letters of October 19, 1960, was conditioned on the necessity of approval by the full TWA Board of Directors, and (b) denies [3768] each and every allegation thereof insofar as a conspiracy is alleged.

(q). Denies that it has any knowledge or information sufficient to form a belief as to the truth of each and every allegation of subparagraph (q) thereof, except (a) admits that Toolco sent letters dated October 22, 1960, to the lending institutions to which reference is made for the terms and provisions thereof, indicating that Toolco no longer considered itself bound by its acceptance of the letters of October 19, 1960, and (b) admits that Irving and other banks commenced offsetting TWA balances against TWA's debt to such banks.

(r) Denies each and every allegation of subparagraph (r) thereof, except admits (1) that Toolco's endeavors to develop an alternative financing plan for TWA were unsuccessful, and (2) that Toolco and TWA offered to proceed under the Dillon Read Plan by letters dated November 30, 1960, to which reference is made for the terms and provisions thereof.

34. Denies each and every allegation of paragraph 95 thereof, except admits (1) that in December, 1960, the necessary transactions and agreements to effectuate the Dillon Read Plan and to place the common stock of TWA owned by Toolco in the voting trust provided for in the Dillon Read Plan were effected, and (2) Breech has served

as a voting trustee and Chairman of TWA's Board of Directors and Tillinghast has served as TWA's President.

35. Denies each and every allegation of paragraph 96 thereof, except as follows:

(a) Denies each and every allegation of subparagraph (a) thereof, except admits that elections of TWA's directors were held at TWA stockholder meetings on February [3769] 28, 1961, and April 27, 1961; that Raymond M. Holliday ("Holliday") is a voting trustee named by Toolco; and that Breech was elected Chairman of the TWA Board of Directors.

(b) Denies each and every allegation of subparagraph (b) thereof, except admits that Tillinghast was elected by the TWA Board of Directors to be President and chief executive officer of TWA; and that Tillinghast entered into an employment contract with TWA, to which reference is made for the terms and provisions thereof.

(c) Denies each and every allegation of subparagraph (c) thereof, except (1) admits that in 1960 Toolco entered into negotiations with Atlas regarding a Northeast-TWA merger; (2) admits that such negotiations culminated in May, 1960, in an agreement of merger, to which reference is made for the terms and provisions thereof; (3) admits that the said merger was not consummated; and (4) denies that it has knowledge or information sufficient to form a belief as to the truth of (a) the third and fifth sentences thereof, or (b) that Breech and Olds failed to recommend the merger to the TWA Board of Directors with full knowl-

edge of the agreement made by Toolco with Atlas Corporation.

(d) Denies each and every allegation of subparagraph (d) thereof, except admits (1) that the Board of Directors of TWA refused to grant Toolco's request for a one-week postponement in an offering by TWA of $111,235,900 principal amount of subordinated debentures, which offering was being made to TWA's stockholders pursuant to agreements made in December, 1960, and the prospectus and registration statement in connection therewith, to which reference is hereby made for the terms and provisions thereof.

(e) Denies each and every allegation of subparagraph (e) thereof, except admits that TWA entered into certain agreements with Boeing for the purchase of additional [3770] jet aircraft from Boeing, costing in excess of $187,500,000, which aircraft were required by TWA.

(f) Denies each and every allegation of subparagraph (f) thereof, except admits that Toolco made certain financial proposals to TWA in a letter dated June 10, 1961, to which reference is made for the terms and provisions thereof, and that TWA did not accept such proposals.

(g) Denies each and every allegation of subparagraph (g) thereof, except admits that TWA filed its complaint in the instant action on or about June 30, 1961, and refers thereto for the terms and provisions thereof.

(h) Denies each and every allegation of subparagraph (h) thereof, except (1) admits that TWA entered into agreements with Equitable, Metropolitan and Irving nd

certain other banks for the supplying of $147,000,000 of additional financing to TWA, and refers to such agreements for the terms and provisions thereof; and (2) denies that it has knowledge or information sufficient to form a belief with respect to the allegations relating to the approval of Toolco or TWA stockholders regarding such agreements except that Dillon Read did not obtain such approval.

36. Denies each and every allegation of paragraph 97 thereof, except (a) admits that TWA's 1960 operating revenues were more than four times greater than those of 1947; (b) admits that its reported earnings before taxes were in excess of $15,000,000 for 1960 and were in excess of $95,600,000 for the period 1947-1960.

37. Denies each and every allegation in paragraph 98 thereof, except (1) admits that TWA's reported 1961 losses before various tax credits, accelerated depreciation and write-offs were in excess of $27,000,000; and (2) denies that it has knowledge or information sufficient to form a [3771] belief with respect to the truth of the last sentence of paragraph 98 thereof.

WITH RESPECT TO THE FOURTH COUNTERCLAIM

38. With respect to paragraph 102 thereof, repeats and realleges with the same force and effect as if herein set forth in full, its responses and replies to paragraphs 42 through 48 thereof, inclusive, paragraphs 62, 69 and 70 thereof, and paragraphs 73 through 97 thereof, inclusive.

39. Denies each and every allegation of paragraphs 103, 104, 105, 106, 107 and 108.

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WITH RESPECT TO THE FIFTH COUNTERCLAIM

40. With respect to paragraph 109 thereof, repeats and realleges with the same force and effect as if herein set forth in full its responses and replies to paragraphs 42 through 48 thereof, inclusive, paragraphs 62, 69 and 70 thereof, and paragraphs 78 through 97 thereof, inclusive.

41. Denies each and every allegation of paragraphs 110, 111, 112, 114, 115, 116 and 117.

42. Denies each and every allegation of paragraph 113 thereof, except admits the existence of Section 288 of the Delaware Corporation Law, the Option Agreement among Irving as Bank Agent, Equitable, Metropolitan and Toolco dated as of December 1, 1960, and the Voting Trust Agreement, to which reference is made for the terms and provisions thereof.

[3772] FOR A FIRST SEPARATE, AFFIRMATIVE AND COMPLETE DEFENSE TO THE FIRST, THIRD, FOURTH AND FIFTH COUNTERCLAIMS.

43. The counterclaims, and each of them, fail to state a claim upon which relief can be granted.

FOR A SECOND SEPARATE, AFFIRMATIVE AND COMPLETE DEFENSE TO THE FIRST, THIRD, FOURTH AND FIFTH COUNTERCLAIMS.

44. At all times relevant hereto Hughes was and is the sole stockholder of Toolco and directed, controlled and dominated its activities. Toolco has been the largest single stock-

holder of TWA since 1939. From 1947 to December 30, 1960, Hughes also directed, controlled and dominated the activities of TWA through the use of Toolco's majority stock holding in TWA.

45. At all times relevant hereto, Toolco's principal business has been the manufacture and sale of equipment for the oil well drilling industry. Upon information and belief, this business has been highly profitable and, as a result, Toolco has accumulated earnings far in excess of the reasonable needs of its oil well drilling equipment business. In order to avoid imposition of high penalty taxes upon such accumulated earnings, Hughes has caused Toolco to invest in a variety of unrelated enterprises, including TWA.

46. On information and belief, Hughes, in 1945 and 1946, deliberately prevented TWA from raising needed equity capital in order to force TWA to become dependent upon Toolco as a source of funds. Early in 1947, Toolco and Hughes assumed direct management of TWA's affairs. On numerous occasions thereafter, TWA was forced to borrow [3773] money from Toolco or otherwise to rely upon Toolco's financial resources.

47. The period of Hughes' control of TWA was marked by unstable management and by poor earnings, inefficient operations and unpopularity among air travelers as compared to other major air carriers in the United States. During the same period other enterprises controlled by Hughes had been subject to frequent and unexpected changes in management. These facts were widely publicized

and were well known to institutional investors throughout the United States.

48. Early in 1959, Hughes retained Dillon Read and two other investment banking firms to act jointly as financial consultants to TWA and Toolco in the preparation and negotiation of a financing plan to raise funds for the purchase of a substantial fleet of jet aircraft previously ordered by Toolco purportedly for use by TWA.

49. The investment bankers proposed several different financing plans during the period from February, 1959, to March, 1960, but Hughes refused to agree to any financing plan which TWA's management felt was fair to minority stockholders and would be approved by the CAB and which the investment bankers, in their judgment, felt would also offer an acceptable investment to lending institutions.

50. In 1959 Boeing commenced delivery of certain jet aircraft ordered from it by Toolco. Toolco thereupon leased these aircraft to TWA on a day-to-day basis at a rental which was highly profitable to Toolco. On information and belief, Toolco, in addition, contemplated tax advantages for itself by manipulation of depreciation and interest charges and other devices.

[3774] 51. In March, 1960, Hughes finally agreed upon the general terms of a financing plan. Thereafter, the investment bankers negotiated with Equitable and Metropolitan, and with TWA's banking group, and by May, 1960, obtained commitments, subject to certain conditions,

from the various lenders to furnish the funds required by TWA on terms acceptable to it which were also accepted by Hughes and Toolco. This commitment of the lenders was not conditioned upon the concurrent transfer to a voting trust of Toolco's stock in TWA. The lenders, however, did reserve the right to insist upon a voting trust in the event there was a change in TWA's then management which they considered would affect them adversely.

52. On information and belief, Hughes' representation that the financing plan negotiated between TWA and the various lenders was acceptable to him was not made in good faith, but only for the purpose of inducing the TWA banks to make interim short-term loans to TWA for purchase of aircraft. In actual fact, Hughes was opposed to this financing plan and did not intend to permit it to be consummated (a) because it would terminate the profitable leasing arrangement then existing between TWA and Toolco and (b) TWA would no longer require Toolco's excess funds to support its business.

53. TWA's then President, Thomas, joined TWA in mid-1958 upon the understanding with Hughes that he would remain for two years and, upon expiration of this period, would then be given an appropriate compensation arrangement. From March, 1960, when Hughes initially agreed to a financing plan, Hughes entered upon a campaign of deliberate harassment of Thomas, calculated to force Thomas to resign his office and thus frustrate TWA's financing plan. Hughes [3775] refused for weeks to negotiate with Thomas regarding his future compensation

and, when he finally permitted Thomas to discuss compensation with him, he refused to continue Thomas as TWA's chief executive officer unless Thomas agreed to forego the right to exercise the judgment and authority normally exercised by a chief executive officer. Unable to agree with Hughes on his compensation arrangement, Thomas resigned as President of TWA in order to accept a more attractive position.

54. The prospective lenders considered Thomas' resignation to be an adverse change of management of TWA and refused to complete the permanent financing of TWA as originally arranged. Such lenders did, however, offer to lend TWA the necessary funds if Toolco simultaneously placed its TWA stock in a voting trust.

55. Hughes asked Dillon Read whether it could persuade the prospective lenders to withdraw the condition of an operative voting trust. Dillon Read advised that in its judgment it would be possible to remove the condition if Hughes would immediately hire a man of known ability, independence and stature in the business community to serve as President of TWA without any restrictions on his authority to act as chief executive. Hughes failed to obtain such a person to act as TWA's President, and, on information and belief, never attempted to do so.

56. Following Thomas' resignation, Hughes and Toolco, and their representatives, attempted to procure financing for Toolco or TWA from other lending institutions, without consulting Dillon Read or its investment banking associates. Due to Hughes' reputation for controversy,

Toolco's then precarious financial condition, TWA's lack of a chief executive officer, and the financial unsoundness of [3776] the plans proposed by Toolco, Toolco and Hughes were unable to procure offers of financing as advantageous to TWA and Toolco as the plan negotiated by Dillon Read and its investment banking associates.

57. In November, 1960, although still negotiating with other lending groups, Hughes and Toolco requested Equitable, Metropolitan and the TWA banks to proceed with what was then known as the "Dillon Read Plan." In December, 1960, Toolco then executed the Voting Trust Agreement and Option Agreement, and agreed to place the shares of TWA stock which it owned in the voting trust as an inducement to the lending institutions to make the contemplated loans to TWA.

58. In 1960 and 1961, on the basis of Toolco's execution of the Voting Trust Agreement and the Option Agreement, and the deposit of the shares of TWA stock which Toolco owned in the voting trust, Metropolitan and Equitable purchased $92,800,000 principal amount of TWA's 6½% Equipment Mortgage Sinking Fund Notes due December 31, 1972, and a group of banks, including Irving and for which Irving acted as agent, loaned to TWA $72,200,000 evidenced by TWA's 6% Equipment Mortgage Serial Notes due December 31, 1961—December 31, 1964.

59. The number of Boeing 131, Boeing 331 and Convair 880 jet aircraft which Toolco ordered in 1956 and 1957, purportedly for TWA's use, was substantially larger

than the number of such aircraft which TWA ultimately acquired. In 1959 and 1960 Toolco reduced the number of such jet aircraft to be made available to TWA, with the understanding that TWA would subsequently acquire later and more improved aircraft to fill the needs of its business. By December, 1960, to Toolco's knowledge, TWA management was developing plans [3777] for acquisition of a substantial number of additional jet aircraft of advanced types.

60. Early in 1961, TWA requested Dillon Read and its associates to prepare plans for financing a substantial number of additional jet aircraft of advanced types.

61. By March, 1961, TWA's credit had already been further impaired by the continuous controversy associated with Hughes' control and by losses connected with the delayed delivery of Convair 880 jet aircraft which resulted from Hughes' and Toolco's deliberate frustration of the long term financing of TWA.

62. Despite TWA's poor credit standing, Dillon Read and its associates prepared a plan for providing TWA with the funds which it required and negotiated tentative commitments from lending institutions, including an insurance company which had not previously made loans to TWA, which would have provided the necessary funds on more favorable terms than those obtained by TWA in December, 1960.

63. After Toolco's public threats, in May and June, 1961, of litigation against TWA, the trustees of the voting

trust, and others, the new lending institution withdrew its tentative commitment to lend to TWA. Dillon Read and its associates attempted to interest others in making the necessary loan, but without success. They jointly advised TWA that under the circumstances then existing, it would be impossible for TWA to obtain financing elsewhere on terms as favorable as had already been negotiated for this financing with the existing lenders. TWA then borrowed the entire amount required from its existing lenders.

64. Any damages which Toolco or TWA have sustained by reason of the transactions complained of have [3778] resulted, not from the acts of Dillon Read, but solely from the conduct of Hughes and Toolco in the pursuit of Hughes' own profit and self-interest, including income-tax advantages accruing to Toolco and Hughes but not to TWA.

FOR A THIRD SEPARATE, AFFIRMATIVE AND COMPLETE DEFENSE TO THE FIRST, THIRD, FOURTH AND FIFTH COUNTERCLAIMS.

65. Repeats and realleges with the same force and effect as if herein set forth in full each and every allegation contained in paragraphs 44 through 63, inclusive.

66. Toolco participated as a proponent in proceedings before the Civil Aeronautics Board which culminated in the Board's approval on December 29, 1960 (Order No. E-16195) of certain transactions between Toolco and TWA involved in the financing and of certain relationships of the voting trustees under the Voting Trust Agreement.

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67. Prior to 1961, Dillon Read negotiated with Equitable, Metropolitan and Irving and obtained their agreement to financing plans for TWA, including plans conditioned upon existence of a voting trust, at the express request of Toolco and its representatives. Toolco and its representatives were fully informed with respect to such negotiations and, with full knowledge of the material facts, expressed their approval of and satisfaction with the manner in which such negotiations were being conducted by Dillon Read.

68. TWA as the recipient, and Toolco as the owner of over 78% of the common stock of TWA, benefited from the making of the aforesaid loans to TWA, since TWA was thereby enabled to finance its program for the acquisition of jet flight equipment.

[3779] 69. Having consented to, participated in, and benefited from that of which it now complains, and having induced Dillon Read to act in accordance with Toolco's wishes, Toolco is barred and estopped by its prior conduct from asserting and prosecuting the counterclaims alleged against Dillon Read and each of such counterclaims, either on Toolco's own behalf or derivatively on behalf of TWA.

FOR A FOURTH SEPARATE, AFFIRMATIVE AND COMPLETE DEFENSE TO THE FIRST, THIRD, FOURTH AND FIFTH COUNTERCLAIMS.

70. Repeats and realleges with the same force and effect as if herein set forth in full each and every allegation contained in paragraphs 44 through 63, inclusive.

Reply of Additional Defendant Dillon, Read & Co. Inc. to Counterclaims, February 5, 1963

71. Toolco is barred by its own unclean hands from asserting and prosecuting the counterclaims alleged against Dillon Read and each of such counterclaims, either on Toolco's own behalf or derivatively on behalf of TWA.

FOR A FIFTH SEPARATE, AFFIRMATIVE AND COMPLETE DEFENSE TO THE FIRST COUNTERCLAIM.

72. Repeats and realleges with the same force and effect as if herein set forth in full each and every allegation contained in paragraphs 44 through 63, inclusive.

73. Dillon Read relied in good faith upon the representations of TWA that it needed the aircraft which it intended to order and upon the provisions of the Voting Trust Agreement that Equitable, Metropolitan and the TWA banks were authorized to deal with TWA with respect for further loans.

FOR A SIXTH SEPARATE, AFFIRMATIVE AND COMPLETE DEFENSE TO THE THIRD COUNTERCLAIM.

[3780] 74. Pursuant to the Voting Trust Agreement, Toolco transferred and assigned to the voting trustees all the common stock of TWA held by it.

75. By reason thereof, Toolco lacks standing to assert any claim derivatively on behalf of TWA and its stockholders.

Reply of Additional Defendant Dillon, Read & Co. Inc. to Counterclaims, February 5, 1963

FOR A SEVENTH SEPARATE, AFFIRMATIVE AND COMPLETE DEFENSE TO THE THIRD COUNTERCLAIM.

76. Toolco has not requested the directors, the voting trustees or the other stockholders of TWA to assert or cause to be asserted such counterclaims on TWA's behalf.

77. Toolco has failed to set forth sufficient reasons for its failure to make such request.

FOR AN EIGHTH SEPARATE, AFFIRMATIVE AND COMPLETE DEFENSE TO THE THIRD COUNTERCLAIM.

78. Toolco has failed to join indispensable parties, to wit, the voting trustees.

FOR A NINTH SEPARATE, AFFIRMATIVE AND COMPLETE DEFENSE TO THE FOURTH AND FIFTH COUNTERCLAIMS.

79. The claims set forth in these counterclaims, if any, are properly assertable, if at all, only by or on behalf of TWA, and Toolco therefore does not have standing to maintain them on its own behalf.

WHEREFORE, defendant Dillon Read demands judgment dismissing the counterclaims asserted against it, with prejudice, together with its costs and disbursements.

February 5, 1963

DUNNINGTON, BARTHOLOW & MILLER

By /s/ CHARLES L. STEWART
A member of said firm
Attorneys for said defendant
161 East 42nd Street
New York 17, New York

Affidavit of Nazeeh S. Habashy, February 6, 1963

[3828]

[CAPTION]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

NAZEEH S. HABASHY, being duly sworn, deposes and says:

1. I am a law clerk employed by Cahill, Gordon, Reindel & Ohl, counsel for Trans World Airlines, Inc. ("TWA"), who has been specially cleared to handle confidential documents in the above-mentioned action.

2. On Wednesday, February 6, at 4:45 PM, I went to the offices of Chester C. Davis, counsel for the Hughes Tool Company ("Toolco"), and requested the production for inspection and copying of the 1961 and 1962 tax returns and financial statements of Toolco which have been ordered produced as described in subparagraphs (v) and (w) of the Special Master's Opinion of January 22, 1963.

[3829] 3. Counsel for Toolco refused to comply with this request.

(Sworn to by Nazeeh S. Habashy on February 6, 1963.)

Toolco's Notice of Position, February 8, 1963

[3849]

[CAPTION]

Sirs:

PLEASE TAKE NOTICE that upon:

(1) the decision of this Court of February 6, 1963 denying Hughes Tool Company's ("Toolco") motion to dismiss the complaint;

(2) the decision of the Court of February 6, 1963 denying the application of Toolco for a determination which would permit a discretionary review at this time by the Court of Appeals pursuant to the provisions of Title 28, U. S. C. § 1292(b);

(3) the enormous expenses which would be incurred by Toolco directly, and indirectly as the 78% owner of plaintiff Trans World Airlines, Inc. ("TWA") in further pre-trial [3850] and trial proceedings and the belief of Toolco that such expenses would exceed the amount of damages provable by plaintiff under the complaint;

(4) the position of Toolco that it may not be properly subjected to further discovery proceedings by plaintiff or the additional defendants at this time; and

(5) all proceedings to date;

Toolco hereby elects, subject only to whatever judicial relief it may hereafter obtain, to rest on the merits of its positions as heretofore taken so that it may avoid the burdens and

expenses involved in further pre-trial and trial proceedings prior to the time that an appellate court has the opportunity to rule upon the decisions and orders heretofore made herein.

Dated: New York, New York
February 8, 1963.

Yours, etc.,

CHESTER C. DAVIS, ESQ.
Attorney for Defendant
Hughes Tool Company
120 Broadway
New York 5, N. Y.

Opinion of the District Court, February 7, 1963

[3830]

[CAPTION]

[APPEARANCES:]

* * *

[3831] METZNER, D. J.:

Defendant Hughes Tool Company (Toolco) moves to dismiss the complaint pursuant to rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure on the grounds that the court lacks jurisdiction over the subject matter and that the complaint fails to state any claim upon which relief can be granted. The original notice of motion was filed on August 9th, 1961 and in addition to the grounds now urged requested summary judgment pursuant to rule 56 of the Federal Rules of Civil Procedure. In effect, the present notice of motion brings on for hearing the original motion.

In its brief Toolco has stated,

> "At the suggestion of the Court (Transcript of pre-trial conference of September 6, 1961, pp. 50, 52) Toolco agreed to postpone the motions and thereafter commenced its pre-trial examination of TWA."

The opinion of this court of January 19th, 1963 sets forth the numerous occasions on which counsel for Toolco agreed

that the motion as originally filed was not ripe for determination. Consequently, it was not a suggestion of the court, to which Toolco courteously agreed, that the matter be postponed. Rather it was an understanding [3832] by counsel that under the decisions of this circuit summary judgment in this type of case should not be considered until the deposition proceedings are completed. (See also *Poller* v. *Columbia Broadcasting System*, 368 U. S. 464, 473 (1962)). The grounds now urged under rule 12(b) existed and were adverted to in the original notice of motion. Since counsel for Toolco has indicated he was prepared at that time to argue the matter, he could just as well have submitted it then, instead of requesting on January 14th, 1963 that the motion now be heard, when the taking of the deposition of Howard R. Hughes is imminent. Furthermore, the Special Master on October 25th, 1962 granted the second adjournment of this deposition, from October 29th to February 11th, 1963, and stated that the long adjournment of more than three months was in order to allow Toolco's counsel sufficient time to make whatever motions he thought were necessary.

On January 14th, 1963, when Toolco moved that its motion to dismiss be set down for hearing, it also requested that TWA first proceed by written interrogatories directed to Hughes, instead of by oral deposition. [3833] This request was formally denied on January 19th, 1963, after a pretrial conference held on January 17th.

Counsel for Toolco continually relates the taking of the deposition to a determination of the motion to dismiss. As I have indicated before, this deposition depends not only on the existence of alleged valid claims against Toolco,

but on Toolco's counterclaims for $385,000,000 against plaintiff and the additional defendants.[1]

[3834] So much for the underbrush. Now as to the merits of the motion, there is no doubt that the complaint on its face sets forth a claim against the defendant and is not subject to dismissal under rule 12(b)(6).

Briefly, the plaintiff, TWA, charges that Toolco, Hughes, and Holliday, named defendants, and Atlas Corporation have combined and conspired to restrain, and have attempted to monopolize, interstate and foreign commerce of the United States in the furnishing of jet aircraft and/or nonjet aircraft by sale, lease or other means, to TWA, and to TWA and other air carriers, in violation of sections 1 and 2 of the Sherman Act and sections 3 and 7 of the Clayton Act. It more specifically alleges that the defendants and Atlas combined to restrain commerce by providing

[1]On the morning of the argument of this motion (February 6th, 1963) Toolco filed another notice of motion returnable February 8th, 1963 requesting that all further proceedings with respect to the counterclaims be stayed pending a disposition by the Civil Aeronautics Board of a "Complaint of Hughes Tool Company and Request for Investigation" which had been filed that day with the CAB. The only document attached to the notice of motion is a copy of the complaint filed with the CAB, seeking relief under sections 408, 409, 411 and 1002 of the Federal Aviation Act. That complaint names all of the additional defendants in the action pending in this court and also Pan American World Airways, Inc. and Juan T. Trippe. It sets forth some of the allegations contained in the counterclaims and also makes reference to the proposed merger of TWA and Pan Am. It further alleges that Trippe, the dominant force in Pan Am, also has been in the position to influence the policies of Metropolitan Life Insurance Company, a large lender to TWA and one of the additional defendants in this action. Thus, the conspiracy alleged in the counterclaims has been enlarged by including Pan Am and Trippe. Jurisdiction of the CAB is predicated upon a claim that the decision in *Pan American World Airways, Inc.* v. *United States*, 31 U. S. L. Week 4124 (U. S. Jan. 14, 1963) (Nos. 23, 47) grants the CAB primary jurisdiction.

financing of the acquisition by TWA of aircraft only upon the condition that TWA acquire all such aircraft from Toolco, and that they required TWA to boycott all suppliers of aircraft except Toolco, in violation of section 1 of the Sherman Act; and that sales and leases of jet-powered aircraft were made on the condition that the purchaser or lessee would not buy or lease the goods of a competitor of the vendor or lessor, in [3835] violation of section 3 of the Clayton Act. The complaint also charges that acquisitions of the stock of a corporation were made in violation of section 7 of the Clayton Act.

The first claim is concerned with acts allegedly committed during and prior to December 1960 which, it is claimed, violate all of the above mentioned statutes. The second claim deals with events occurring subsequent to December 1960 which are alleged to violate sections 1 and 2 of the Sherman Act and section 7 of the Clayton Act. For these claims, plaintiff seeks treble damages, divestiture, and an injunction. The third claim charges that the defendants have wilfully and maliciously damaged the business of TWA by the acts alleged in the prior claims, and seeks damages and an injunction under the common law.

Defendant Toolco urges that the complaint be dismissed because the control by Toolco over the plaintiff was authorized by the CAB and was thereby exempted from the anti-trust laws. The other ground urged is that the subject matter of the complaint is within the exclusive primary jurisdiction of the CAB.

[3836] Toolco indicates that it has withdrawn its motion for summary judgment. However, its brief relies on matter outside the complaint to justify dismissal on the ground that the acts done by Toolco were pursuant to the exercise of control over TWA authorized by the CAB

and therefore exempt from the antitrust laws. Dismissal under rule 12(b)(6) is not warranted, though summary judgment might be available. *Putnam* v. *Air Transport Ass'n of America*, 112 F. Supp. 885 (S. D. N. Y. 1953). The defendant appears to be in a procedural dilemma. Since defendant has raised the issue of exemption in its third affirmative defense, the court will consider this branch of the motion as one for judgment on the pleadings pursuant to rule 12(c). Matters dehors the complaint may be considered on the branch of the motion seeking dismissal for lack of subject matter jurisdiction. *Cohen* v. *American Window Glass Co.*, 126 F. 2d 111, 114 (2d Cir. 1942); *Central Mexico Light & Power Co.* v. *Munch*, 116 F. 2d 85 (2d Cir. 1940); *Moore* v. *Gorman*, 75 F. Supp. 453 (S. D. N. Y. 1948).

Toolco relies on the 1944 and 1950 orders of the CAB permitting Toolco to acquire control of TWA, 6 CAB 153; 12 CAB 192. These orders were issued pursuant [3837] to section 408(5) of the Civil Aeronautics Act of 1938,[2] which makes it unlawful without CAB approval for "any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever." Toolco was considered as one engaged in a phase of aeronautics because of its activities in the development of aircraft and accessories.

Section 414 of the Federal Aviation Act, 49 U. S. C. § 1384, provides that

> "Any person affected by any order under sections 408 [49 U. S. C. § 1378] . . . shall be, and is

[2]This section is now 49 U. S. C. § 1378(5). The Federal Aviation Act of 1958, 72 Stat. 737, 49 U. S. C. § 1301 et seq., superseded the Civil Aeronautics Act of 1938, 52 Stat. 973, making no changes relevant to the problem before the court.

> hereby, relieved from the operations of the 'anti-trust laws' . . . and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order."

It is Toolco's contention that all the acts complained of by TWA are immunized from claims of violations of the antitrust laws because of section 414. [3838] This leads to an examination of what action was approved by the orders issued pursuant to section 408(5) and what is the scope of the exemption provided by the words "insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order" in section 414.

Statutory authority granted regulatory agencies to give exemption from the application of the antitrust laws is not unusual.[3] But the Supreme Court has clearly stated that immunity from the antitrust laws is not to be lightly implied. *California* v. *Federal Power Comm'n*, 369 U. S. 482, 485 (1962). Regulated industries are not per se exempt [3839] from the antitrust laws. *United States* v. *Borden*

[3]See, e.g., 47 U. S. C. § 222(b)(1) (telegraph mergers approved by the Federal Communications Commission); 47 U. S. C. § 221(a) (telephone mergers approved by FCC); 46 U. S. C. § 814 (rate fixing and other agreements between water carriers approved by the Federal Maritime Board); 49 U. S. C. § 5 (railroad mergers approved by the Interstate Commerce Commission); 49 U. S. C. §§ 5a-b (agreements between carriers involving rates approved by ICC); 15 U. S. C. § 18 (exempting from the operation of section 7 of the Clayton Act transactions approved within their statutory authority by the CAB, FC, Federal Power Commission, ICC, FMB, Secretary of Agriculture, and, in some cases, the Securities and Exchange Commission).

Co., 308 U. S. 188, 198-99. And it is elementary that repeals by implication are not favored. *Georgia* v. *Pennsylvania R. R.*, 324 U. S. 439, 456 (1945). In the latest decision by the Supreme Court, *Pan American World Airways, Inc.* v. *United States*, *supra* note 1, which will be discussed in detail below, the Court stated that the regulatory scheme here in question would not be read as designed completely to displace the antitrust laws "absent an unequivocally declared congressional purpose so to do." 31 U. S. L. Week at 4126. It went on to say that the antitrust problems "expressly entrusted to [the CAB] encompass only a fraction of the total." *Ibid.*

The orders of 1944 and 1950 relied on by Toolco merely approved the acquisition of control of TWA by Toolco. The antitrust violations that could possibly be present in such acquisition—that it was a contract in restraint of trade prohibited by section 1 of the Sherman Act, or was an attempt to monopolize prohibited by section 2 of the Sherman Act, or was an acquisition of stock prohibited by section 7 of the Clayton Act—were within the contemplation of the approval orders and protected by the exemption provided [3840] by section 414. *Cf. United States* v. *Southern Pac. Co.*, 290 Fed. 443 (D. Utah 1923). These orders did not give Toolco a license to engage in other acts that normally may be forbidden by the antitrust laws. What has been approved and exempted is the fact of "acquisition of control", not activities engaged in by the controlling party subsequent to acquisition, which may be illegal.

I have found no case and none has been cited to me which interprets the words "necessary to enable such person to do anything authorized, approved, or required by such order", or similar exemptive language in other stat-

utes, in a way that will sustain Toolco's position. In *Putnam* v. *Air Transport Ass'n of America, supra,* the plaintiff was attacking a claimed boycott by the defendants. The court in applying section 414 stated that the boycott was "the inevitable result" of the agreement sanctioned by the CAB which by its terms permitted the defendants to choose with whom they would deal. This is far different from the immunization claimed by Toolco. Congress could not have intended that restraints or attempts to monopolize, subsequent to an order allowing acquisition of control, were necessary to enable Toolco to do anything authorized or approved by the order.

[3841] One more point merits discussion under this branch of the motion. The second claim for relief is based on acts alleged to have been committed by the defendants and Atlas subsequent to December 1960. In December 1960 TWA moved before the CAB for modification of the original order of 1944 as amended. Approval was also sought

> "under section 408 . . . for the transactions contemplated under the financing plan. Similarly sought is approval . . . under section 409 of the Act, of the interlocking relationships arising out of the designation of Raymond M. Holliday, as a representative of Toolco, and of Ernest R. Breech and Irving S. Olds as representatives of the banks and institutional investors, to serve as Voting Trustees under a Voting Trust set up for the Toolco-TWA stock."

This relief was requested in connection with the jet aircraft financing transactions which resulted in Toolco's putting its 78% stock interest in TWA under a voting trust, which in

effect gave control of TWA to the lenders who are named as additional defendants in this action.

On December 29th, 1960 the CAB entered its order on this motion (Order No. E-16195). In the course of the opinion, the CAB said at page 6:

> [3842] "Under these circumstances, we think it clear that Board action to facilitate TWA's acquisition of jet equipment is in the public interest. At the same time, however, it is evident that Toolco's control of TWA, as exercised through Hughes, has presented substantial problems requiring the Board's attention.
>
> "In short, and without further description of these problems, the Board wishes to make clear the fact that it would anticipate the proper filing of an application under section 408 of the Act and the obtaining of the approval of the Board before Toolco would attempt to reassume control over TWA.[19] It is clear that such approval would not be forthcoming without a searching inquiry into the public interest factors affecting this control.[20]"

Footnote 19 in the above quotation reads as follows:

> "The Option Agreement requires Toolco, in exercising the option, to provide a satisfactory opinion of counsel that the exercise of the option, by purchase of the notes, does not require governmental or regulatory approval or that such approval has been granted and is in force. No such provision could, of course, preclude dissolution of the voting trust after the ten-year term has expired. Nonethe-

> less, it is clear that Toolco should not resume direct control at that time unless prior approval of the Board is sought and obtained."

It is clear from this opinion that the CAB does not look upon Toolco as controlling TWA after December 1960. Thus, anything done by Toolco subsequent to that date has not been approved by orders of the CAB and certainly no exemption exists as to the second claim.

[3843] We come now to the question of "primary jurisdiction" which is defendant's second ground for dismissal of these claims. In discussing the primary jurisdiction of the CAB in relation to this complaint, there is some overlap with the discussion as to the effect of an order issued under section 408(5) and the extent of the exemption granted by section 414. In this case we are concerned primarily with whether there exists exclusive primary jurisdiction in the CAB without regard to whether or not it has taken any action in relation to a particular transaction. *Cf. Far East Conference* v. *United States*, 342 U. S. 570 (1952).

Defendant places great reliance upon the recent decision of the Supreme Court in *Pan American World Airways, Inc.* v. *United States*, *supra*, popularly known as the *Panagra* case. In determining the scope of this decision we must first go to the next to the last sentence of the majority opinion, which reads:

> "We think the narrow questions presented by this complaint have been entrusted to the Board and that the complaint should have been dismissed." 31 U. S. L. Week at 4129.

[3844] The Court was dealing with section 411 of the act, 49 U. S. C. § 1381, which gives the CAB jurisdiction over

"unfair or deceptive practices" and "unfair methods of competition" by air carriers. The acts charged to be antitrust violations were limitations of routes, divisions of territories, and the relation of a common carrier to air carriers, which the Court stated were "precise ingredients of the Board's authority in granting, qualifying, or denying certificates to air carriers, in modifying, suspending, or revoking them, and in allowing or disallowing affiliations between common carriers and air carriers." 31 U. S. L. Week at 4126. The Court went on to say:

> "It would be strange, indeed, if a division of territories or an allocation of routes which met the requirements of the 'public interest' as defined in § 2 were held to be antitrust violations. It would also be odd to conclude that an affiliation between a common carrier and an air carrier that passed muster under § 408 should run afoul of the antitrust laws. Whether or not transactions of that character meet the standards of competition and monopoly provided by the Act is peculiarly a question for the Board, subject of course to judicial review. . . ." 31 U. S. L. Week at 4127.

If we substitute in this quotation the words "acquisition of control of any air carrier by any person engaged in [3845] any other phase of aeronautics" in place of "an affiliation between a common carrier and an air carrier", we have presented the fact situation upon which Toolco relies. However, the acts complained of by TWA are acts allegedly done by the controlling party after the acquisition had been approved, not only to the detriment of the carrier in question, but to other carriers and to competitors of the controlling party. This in my view is the distinguishing factor

between this case and the *Panagra* case. While the acts charged here could be proper subjects for consideration by the Board in determining whether control of TWA by Toolco was in the public interest,[4] they are not the type of acts over which the Board has exclusive primary jurisdiction. They are not within the contemplation of the regulatory powers granted the CAB. *Cf. Georgia* v. *Pennsylvania R. R., supra.*

Furthermore, the Board has no power to award damages, and we do not reach the statement of the Court in the *Panagra* case to the effect that since the Board's [3846] essential regulatory powers deal with the division of territories, etc., then Congress must have intended to give it authority that was ample to deal with the evil at hand. Rather, the statement by the Court that a court has jurisdiction under the antitrust laws if the agency has no power to grant relief is controlling here. 31 U. S. L. Week at 4128 n. 19.

It is also clear that once a regulatory agency has acted the court is competent to consider and determine the scope of the exemption claimed. *River Plate & Brazil Conferences* v. *Pressed Steel Car Co.*, 227 F. 2d 60 (2d Cir. 1955); *Putnam* v. *Air Transport Ass'n of America, supra.* The cases of *American Airlines* v. *Standard Air Lines*, 80 F. Supp. 135 (S. D. N. Y. 1948) and *United States* v. *Railway Express Agency*, 89 F. Supp. 981 (D. Del. 1950), relied on by Toolco, are not in point.

In addition to the determination that as a matter of law the Board does not have exclusive primary jurisdiction over the acts alleged in the complaint, the practical aspects of this case make especially apposite the statement in the *River Plate* case, *supra*, [3847] to the effect that a reference to

[4]See CAB Order No. E-16195 quoted at page 13, *supra.*

the agency would be "useless and time-consuming" (227 F. 2d at 63). Over 10,000 pages of testimony have already been taken by Toolco in deposition proceedings and over one and a quarter million documents have been produced in these proceedings by all parties. If there is any policy that would favor referral, it is not present in this case. See *Atlantic Coast Line R. R.* v. *Riss & Co.*, 267 F. 2d 657, 658 (D. C. Cir. 1958).

Consequently, the motion to dismiss is denied. The application made upon oral argument for a certificate pursuant to 28 U. S. C. § 1292(b) was denied at that time. Toolco's application for a stay of all deposition-discovery proceedings pending an application for a stay to the Court of Appeals was granted on the oral argument to the extent that all deposition-discovery proceedings are stayed until 5 p. m. February 8th, 1963 to allow Toolco time to request a stay from the Court of Appeals beyond that time.

[3848] So ordered.

Dated: New York, New York
February 7, 1963

CHARLES M. METZNER
U. S. D. J.

The above opinion is filed pursuant to the order of the court entered on February 6th, 1963, which was endorsed on the back of the notice of motion dated January 14, 1963 and which reads as follows:

> "Upon consideration of defendant's brief filed on 2/1/63 in support of the motion to dismiss, the answering brief of plaintiff filed on 2/2/63 in opposition, defendant's reply brief filed at noon today, and

the oral argument on said motion, the motion to dismiss is denied. A formal opinion giving the reasons of the court will follow. So ordered.

Feb. 6, 1963 at 6:05 p. m.

CHARLES M. METZNER
U. S. D. J."

Reply of Plaintiff Trans World Airlines, Inc. to Counterclaims, February 11, 1963

[3852]

[CAPTION]

In view of all prior proceedings in this case including particularly the proceedings before the Honorable Charles M. Metzner, United States District Judge, on Friday, February 8, 1963, plaintiff Trans World Airlines, Inc., as and for its reply to the purported counterclaims of defendant Hughes Tool Company ("Toolco") alleges as follows:

I—As to purported counterclaims numbered 1 through 5 inclusive,

A. Plaintiff repeats and realleges as though set forth individually and fully herein each of the denials contained in the replies of each of the additional defendants herein, all of which are incorporated by reference in this reply.

[3853] B. Plaintiff repeats and realleges as though set forth individually and fully herein such of the admissions contained in the replies of the additional defendants herein as are common to all such replies, all of which are incorporated by reference in this reply.

II—*As to purported counterclaim numbered 6,* except to the extent admitted in plaintiff's motion for summary judgment with respect thereto, filed March 31, 1962, which is *now sub-judice*, plaintiff denies each and every allegation contained therein.

III—*As and for its separate defenses to each and all of the purported counterclaims* plaintiff repeats and re-

alleges as though set forth fully herein each separate defense contained in the reply of each additional defendant, all of which are incorporated by reference in this reply.

WHEREFORE, plaintiff demands judgment dismissing the counterclaims with prejudice together with its costs and disbursements.

Dated: February 11, 1963

CAHILL, GORDON, REINDEL & OHL

By JOHN F. SONNETT
Attorneys for Plaintiff
80 Pine Street
New York 5, New York

Reply of Additional Defendant Charles C. Tillinghast, Jr. to Counterclaims, February 11, 1963

[3854]

[CAPTION]

Additional defendant, Charles C. Tillinghast, Jr., by his attorneys, Chadbourne, Parke, Whiteside & Wolff, for his reply to the counterclaims of defendant, Hughes Tool Company herein, states:

AS AND FOR AN ANSWER TO THE FIRST ALLEGED COUNTERCLAIM

1. Admits the allegations contained in paragraphs 42, 43 and 47 of the counterclaims.

2. Denies that he has knowledge or information sufficient to form a belief as to the allegations [3855] of paragraph 44 of the counterclaims, except admits that Equitable and Metropolitan are corporations existing under the laws of the State of New York; admits that from 1947 to December, 1960 Equitable was a holder of TWA's senior indebtedness; and admits that at all times since December, 1960 Equitable and Metropolitan have been holders of senior indebtedness of TWA.

3. Denies that he has knowledge or in ormation sufficient to form a belief as to the allegations of paragraph 45 of the counterclaims, except admits that Irving maintains a place of business at One Wall Street, New York City, and is and for many years has been one of TWA's principal commercial bankers, has made loans and participated with other lending institutions in making loans to TWA and has undertaken on behalf of TWA to bring

together lending institutions for the purpose of participating in loans to TWA.

4. Denies that he has knowledge or information sufficient to form a belief as to the allegations of paragraph 46 of the counterclaims, except admits that from December 1960, until his resignation on or about January 26, 1962, Breech was one of the voting trustees with respect to 5,221,301 shares of TWA's stock owned [3856] by Toolco which were placed in a voting trust in December 1960; admits that two of the voting trustees, including Breech, were selected by a majority of the Noteholders as defined in a certain Noteholders' Agreement dated December 1, 1960; and admits that Breech is and at all times since April 27, 1961 has been the Chairman of the Board of Directors of TWA.

5. Denies that he has knowledge or information sufficient to form a belief as to the allegations of paragraph 48 of the counterclaims, except admits that Dillon, Read has been a principal financial adviser to TWA.

6. With respect to the allegations contained in paragraph 49 of the counterclaims, this additional defendant neither admits nor denies said allegations since they are a matter of law for determination by the court.

7. Denies that he has knowledge or information sufficient to form a belief as to the allegations of paragraphs 50 and 51 of the counterclaims, except admits that there were various proposals advanced and negotiations had during said period concerning financing of TWA's flight equipment; admits that certain [3857] agreements were

entered into and refers to said agreements for their full terms and provisions; denies that anyone other than a majority of the Noteholders as defined in a certain Noteholders' Agreement dated December 1, 1960 designated Breech and Olds as two of the three voting trustees.

8. Denies each and every allegation contained in paragraph 52 of the counterclaims, except refers to said agreements and the by-laws of TWA for the full terms and provisions thereof.

9. Denies that he has knowledge or information sufficient to form a belief as to the allegations of paragraph 53 of the counterclaims, except denies said allegations insofar as they relate to this additional defendant, but admits that in or about March 1961, he was asked to become TWA's President; that in March 1961 he possessed no experience as an employee in the airline industry and that he had previously acted as attorney for a corporation for which Breech was the Chief Executive Officer; that he entered into an employment contract with TWA, and refers to said contract for the full terms and provisions thereof; that he is now 51 years of age; that TWA entered into [3858] agreements with Boeing and others for the purchase of additional jet aircraft and related equipment at a total cost of approximately $187,500,000; that in connection with said purchase of jet equipment certain financing agreements and arrangements were made and refers to said agreements for the full terms and provisions thereof; that Toolco asked to be informed as to the details of the contemplated financing and that on one occasion for proper business reasons Toolco's request for detailed terms of the financing currently being negotiated was not complied with.

10. Denies each and every allegation contained in paragraphs 54, 55, 56, 57, 58 and 59 of the counterclaims, except admits that Dillon, Read received certain payments from TWA for services rendered in connection with TWA's 1961 financing.

AS AND FOR AN ANSWER TO THE THIRD ALLEGED COUNTERCLAIM

11. Repeats and realleges the responses to each paragraph of the counterclaim referred to in paragraph 68 thereof and denies that he has knowledge or information sufficient to form a belief as to the allegations of paragraph 62 of the counterclaims, except admits that Metropolitan and Equitable have supplied financing to TWA.

12. Denies that he has knowledge or information sufficient to form a belief as to the allegations [3859] of paragraph 69 of the counterclaims.

13. Denies that he has knowledge or information sufficient to form a belief as to the allegations of paragraph 70 of the counterclaims, except denies that Sessel has been a director of TWA since 1955, but admits that Sessel has been a director of TWA since March 1956.

14. Denies each and every allegation contained in paragraph 71 of the counterclaims, except admits that no demand was made upon the directors or stockholders of TWA to bring this claim and admits that approximately 78.2% of the stock of TWA is held in the Voting Trust.

15. Denies that he has knowledge or information sufficient to form a belief as to the allegations of paragraphs

72, 73, 74 and 75 of the counterclaims, except denies that this additional defendant violated the statutes referred to therein.

[3860] 16. Denies each and every allegation contained in paragraphs 76 and 77 of the counterclaims, except admits that during 1960 and 1961 TWA borrowed certain sums from Equitable, Metropolitan and Irving.

17. Denies that he has knowledge or information sufficient to form a belief as to the allegations of paragraph 78 of the counterclaims, except admits that Toolco participated in the acquisition and financing of certain flight equipment for TWA.

18. Denies that he has knowledge or information sufficient to form a belief as to the allegations of paragraphs 79, 81 and 83 of the counterclaims.

19. Denies that he has knowledge or information sufficient to form a belief as to the allegations of paragraph 80 of the counterclaim, except admits that Equitable was one of TWA's senior lenders and, in 1956, held $40 million in principal amount of TWA's Sinking Fund Bonds.

20. Denies that he has knowledge or information sufficient to form a brief as to the [3861] allegations of paragraph 82 of the counterclaims, except admits that Dillon, Read was retained by TWA in connection with the financing of TWA's flight equipment.

21. Denies that he has knowledge or information sufficient to form a belief as to the allegations of paragraph 84 of

the counterclaims, except admits that TWA leased jet aircraft from Toolco; admits that TWA placed jet aircraft in transcontinental service shortly after one of its principal competitors and in advance of its other principal domestic competitor; and admits that TWA realized earnings before taxes in excess of $17.4 million in 1959 and in excess of $15.2 million in 1960.

22. Denies that he has knowledge or information sufficient to form a belief as to the allegations of paragraph 85 of the counterclaims, except admits that certain jet aircraft acquired by TWA were financed in part through loans from Irving and other banks.

23. Denies that he has knowledge or information sufficient to form a belief as to the [3862] allegations of paragraph 86 of the counterclaims, except denies that he participated in any alleged conspiracy.

24. Denies that he has knowledge or information sufficient to form a belief as to the allegations of paragraphs 87 through 94, inclusive, of the counterclaims, except admits that there were various proposals advanced and negotiations had during said period concerning financing of TWA's flight equipment.

25. Denies each and every allegation contained in paragraph 95 of the counterclaims, except admits that certain agreements were executed in December, 1960 concerning the Voting Trust of the common stock of TWA owned by Toolco and financing for TWA's acquisition of certain aircraft and refers to said agreements for the full terms and provisions thereof.

Reply of Additional Defendant Charles C. Tillinghast, Jr. to Counterclaims, February 11, 1963

26. Denies that he has knowledge or information sufficient to form a belief as to the allegations of paragraph 96(a) and that part of paragraph 96(c) of the counterclaims which relates to events prior to his becoming president of TWA in April 1961, except denies that he participated in any alleged conspiracy; admits that there were [3863] changes made in TWA's Board of Directors in February and April 1961 and that Breech was elected chairman thereof; and admits that certain proposals and agreements contemplating the merger of TWA and Northeast Airlines were made. Denies each and every allegation contained in the remaining subparagraphs of paragraph 96 of the counterclaims, including that part of paragraph 96(c) which relates to events after April 1961, except admits that in or about March 1961 he was asked to become TWA's president; admits that he entered into an employment contract with TWA, and refers to said contract for the full terms and provisions thereof; admits that TWA, for proper business reasons, did not enter into a merger with Northeast Airlines; admits that partly because of TWA's route structure, traffic on its routes for many years has decreased significantly in the winter months; admits that Breech and Olds did not recommend the merger of TWA and Northeast Airlines to the TWA Board of Directors; admits that TWA, for proper business reasons, refused to grant Toolco's request for a one week's postponement in an offering by TWA of $111,235,900 principal amount of subordinated debentures with warrants attached; admits that TWA entered into agreements with [3864] Boeing and others for the purchase of additional jet aircraft and related equipment; admits that, in connection with such purchase of additional jet equipment, certain financing arrangements and agreements were made,

and refers to said agreements for the full terms and provisions thereof; admits that TWA, for proper business reasons, did not accept various purported proposals made by Toolco concerning the providing of additional capital to TWA; and admits that on or about June 30, 1961 TWA filed a complaint in this action, and refers to said complaint for the full terms and provisions thereof.

27. Admits the allegations contained in paragraph 97 of the counterclaims, except with respect to the allegation that the business of TWA "grew steadily" from 1947 through 1960, admits that TWA's operating revenues increased during such years.

28. Denies each and every allegation contained in paragraphs 98, 99, 100 and 101 of the counterclaims.

[3865] AS AND FOR AN ANSWER TO THE FOURTH ALLEGED COUNTERCLAIM

29. Repeats and realleges the responses to each paragraph of the counterclaims referred to in paragraph 102 thereof.

30. Denies each and every allegation contained in paragraphs 103 through 108, inclusive, of the counterclaims.

AS AND FOR AN ANSWER TO THE FIFTH ALLEGED COUNTERCLAIM

31. Repeats and realleges the responses to each paragraph of the counterclaims referred to in paragraph 109 thereof.

Reply of Additional Defendant Charles C. Tillinghast, Jr. to Counterclaims, February 11, 1963

32. Denies each and every allegation contained in paragraphs 110, 111, 112, 114, 115, 116 and 117 of the counterclaims.

33. Denies that he has knowledge or information sufficient to form a belief as to the allegations of paragraph 113 of the counterclaims, except denies that he participated in any alleged conspiracy.

[3866] AS AND FOR AN AFFIRMATIVE DEFENSE

34. The counterclaims alleged against this additional defendant fail to state claims upon which relief can be granted.

WHEREFORE, additional defendant Charles C. Tillinghast, Jr. prays judgment dismissing the counterclaims alleged against him herein, together with costs and disbursements, and such other, further and different relief as to the Court shall seem just and proper.

CHADBOURNE, PARKE, WHITESIDE & WOLF

By CARL S. ROWE

A member of the Firm
Attorneys for Additional Defendant,
Charles C. Tillinghast, Jr.
Office & P. O. Address:
25 Broadway
New York 4, N. Y.

Dated: New York, New York
February 11, 1963

Notice of Motion of Additional Defendants, February 15, 1963

[4868]

[CAPTION]

SIRS:

PLEASE TAKE NOTICE that upon the orders of the Hon. Charles M. Metzner dated September 21, 1962, January 10, 1963, January 19, 1963 and February 1, 1963, the transcript of proceedings before the Hon. Charles M. Metzner on February 8, 1963, the transcript of proceedings before the Special Master, Hon. J. Lee Rankin, on January 23, 1963, the affidavits of Bruce Bromley, William C. Chanler, Charles L. Stewart and Carl Rowe annexed hereto, appendices incorporated therein, the counterclaims herein and the replies thereto, and upon all the papers heretofore filed and the prior proceedings had herein before the Court and the Special Master, the additional defendants The Equitable [4869] Life Assurance Society of the United States, Metropolitan Life Insurance, Irving Trust Company, Dillon, Read & Co. Inc., Ben-Fleming Sessel, James F. Oates, Jr., Harry C. Hagerty and Charles C. Tillinghast, Jr. will move before the Hon. Charles M. Metzner at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York, at 5 p. m. in the afternoon on February 21, 1963, for an order pursuant to Rules 41(b), 41(c), 37(b)(2), 37(d) and 54(b) of the Federal Rules of Civil Procedure expressly determining that there is no just reason for delay, and expressly directing the entry of a final judgment dismissing with prejudice as to said additional defendants and each of them this action and each and all of the counterclaims asserted against them herein by defendant Hughes Tool Company, for its wilful and delib-

erate disobedience of and failure and refusal to comply with the aforesaid orders of January 10, 1963, January 19, 1963 and February 1, 1963, and awarding to said additional defendants their costs and disbursements in the action; and for such further relief as to the Court may seem just and proper.

February 15, 1963.

CRAVATH, SWAINE & MOORE

By BRUCE BROMLEY
A Member of the Firm

Attorneys for Additional Defendants
The Equitable Life Assurance Society of the United States, Metropolitan Life Insurance Company, James F. Oates, Jr. and Harry C. Hagerty,
1 Chase Manhattan Plaza,
New York 5, N. Y.

[4870] WINTHROP, STIMSON, PUTNAM & ROBERTS

By W. C. CHANLER
A Member of the Firm

Attorneys for Additional Defendants
Irving Trust Company and Ben-Fleming Sessel,
40 Wall Street,
New York 5, N. Y.

DUNNINGTON, BARTHOLOW & MILLER

By CHARLES L. STEWART
A Member of the Firm

Attorneys for Additional Defendant
Dillon, Read & Co. Inc.,
161 East 42nd Street,
New York 17, N. Y.

Notice of Motion of Additional Defendants, February 15, 1963

CHADBOURNE, PARKE, WHITESIDE & WOLFF

By CARL S. ROWE
A Member of the Firm

Attorneys for Additional Defendant
Charles C. Tillinghast, Jr.,
25 Broadway,
New York 4, N. Y.

Affidavit of Bruce Bromley, February 15, 1963

[4871]

[CAPTION]

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

BRUCE BROMLEY, being duly sworn, deposes and says:

I am a member of the firm of Cravath, Swaine & Moore, attorneys for The Equitable Life Assurance Society of the United States, Metropolitan Life Insurance Company, James F. Oates, Jr. and Harry C. Hagerty, additional defendants on the first five counterclaims herein. I make this affidavit in support of a motion by said additional defendants pursuant to Rules 37(b)(2), 37(d), 41(b) and 41(c) for an order dismissing the first five counter- [4872] claims herein with prejudice as to them by reason of the repeated deliberate refusals of defendant Hughes Tool Company (Toolco) to make discovery in accordance with the Rules of Civil Procedure and lawful orders of this Court. This affidavit is also submitted in support of an application for immediate entry of judgment dismissing such counterclaims pursuant to Rule 54(b) and for an express determination that there is no just reason for delay of the entry of such judgment.

BASIS FOR THE MOTION SUMMARIZED

Toolco has repeatedly refused to produce two major categories of highly relevant documents and has also refused to produce its managing agent for examination before trial by the additional defendants. On January 23, 1963, Toolco refused to produce certain allegedly privileged

documents which it had been ordered to produce under Rule 34 on several occasions, most recently by an order of this Court dated January 19, 1963. On February 1, 1963, and on each day thereafter up to and including February 11, 1963, Toolco refused to produce certain so-called tax documents which it had been ordered to produce under Rule 34 by this Court on February 1, 1963. On February 8 and February 11, 1963, Toolco and Howard R. Hughes (Hughes), Toolco's managing agent, wilfully refused and failed to appear before the Special Master for examination before trial in accordance with several previous orders of this Court, the latest of which was dated January 19, 1963. Each of said refusals was intentionally made in direct contempt of a lawful order of this Court issued in accordance with the Rules of Civil [4873] Procedure and separately and together justifies dismissal with prejudice of the counterclaims herein.

THE TREMENDOUS BURDEN IMPOSED ON THE ADDITIONAL DEFENDANTS BY TOOLCO'S PREVIOUS PROSECUTION OF THE COUNTERCLAIMS

The counterclaims were filed and the action commenced as against the additional defendants on February 13, 1962. It thereupon became necessary for counsel immediately to begin day-by-day participation in the Toolco depositions already in progress, although we had not as yet had an opportunity to examine the facts sufficiently even to file a responsive pleading. Within days my clients were required to produce tens of thousands of pages of documents for production and copying by the Toolco attorneys. Within four weeks counsel for all parties were engaged in a full-scale discovery program which in the course of the next six

months produced for inspection and copying well over a million pages of documents. During the rest of the year 1962, with intermittent interruptions, the attorneys for Toolco enjoyed the exclusive right of conducting deposition discovery before the Special Master, in all of which counsel for the additional defendants were required to attend and participate. At the same time that those depositions were going forward it was necessary for us to copy, organize, analyze and summarize the tremendous quantity of documents which had been produced in discovery proceedings by all parties. It was also necessary to prepare for the cross-examination of various witnesses undergoing direct examination by the Tool Company and, during the last several months, to prepare for the examination of Toolco by Mr. Hughes. During the last few weeks before February 8 it was necessary for us to set up a special office in Los Angeles and to transfer to it over [4874] 800 binders of documents and other material. Those steps were necessary because Toolco's counsel refused to "function" on the matter of the Hughes deposition.

In this office alone the manpower requirements for the foregoing activities have involved the services of at least a dozen lawyers, several of them on a full time basis and for others a major portion of their time, as well as the hiring of a whole battery of file clerks and the like. To my personal knowledge such activities have involved direct expense to my clients for legal fees and disbursements of several hundred thousands of dollars through the end of last year—to say nothing of the obvious tremendous inconvenience and disruption of their regular business activities.

It is in this context of the case, after the Tool Company has enjoyed exclusive deposition discovery rights for a year at great inconvenience and expense to my clients, that its

peremptory and contemptuous refusal to afford us even preliminary discovery on obvious critical factual areas must be viewed.

This Court is familiar with the so-called "positions" of Toolco which have assertedly led to its refusal to comply with discovery orders. Such asserted "positions" of Toolco neither explain nor justify Toolco's contemptuous defiance in three major areas of the lawful orders of the Court, particularly in view of the record. Moreover, on the basis of our review of documentary and other information to date (more fully described in the affidavit of William C. Chanler), it is perfectly clear to me that the real reason for Toolco's refusal to make discovery is the certainty that such discovery would demonstrate that the counterclaims are merely a smokescreen designed to mask the reality of the depredations inflicted upon TWA for Toolco's own selfish purposes.

[4875] TOOLCO'S REFUSAL TO PRODUCE THE SO-CALLED PRIVILEGED DOCUMENTS

On February 14, 1962, the above-named additional defendants moved pursuant to Rule 34 of the Rules of Civil Procedure for an order requiring Toolco to produce for said additional defendants certain categories of documents for inspection and copying. (A copy of that motion is attached hereto as Appendix F and made a part hereof). The Special Master granted that motion on February 16, 1962 (Tr. 1482-1512 of 2/16/62). On March 15, 1962, Toolco produced certain of those documents in New York City, Houston, Texas and Los Angeles, California.

However, a number of documents admittedly called for by that Rule 34 motion and the Special Master's order

were withheld by Toolco under a claim that such documents were not subject to production because they were protected by the attorney-client privilege. Such documents were potentially of great significance to my clients' defense of the counterclaims because Toolco had for many years used its counsel as business agents and, indeed, the financing and voting trust agreements repeatedly referred to in the allegations of the counterclaims as having been forced upon Toolco as a result of my clients' alleged unlawful conduct were primarily negotiated on Toolco's behalf by its counsel. Accordingly, Toolco's claim of privilege was argued and briefed at great length before the Special Master. On April 17, 1962, the Special Master ruled that the privilege had been deliberately waived by Toolco through disclosure in several affidavits and in its pleadings and ordered such documents to be produced for the additional defendants (Tr. [4876] 4361-4391 of 4/17/62). That order of the Special Master was affirmed by this Court by order dated July 24, 1962. Thereafter, the same matter was reargued by Toolco before the Special Master on September 15, 1962. Again, the Special Master ordered the documents produced (Tr. 164-167 of 9/15/62). Again the Master's order was affirmed by the Court in its order dated January 10, 1963. In that order the Court directed that such documents be produced by 12 noon on January 14, 1963. At that time on January 14, we made specific demand on Toolco to produce those documents, but counsel for Toolco refused to make such production. It should be noted that the documents at the time of that demand were conveniently assembled in an envelope which counsel exhibited but refused to produce. (Attached hereto as Appendix A and made a part hereof is a transcript of the proceedings on January 14, 1963.)

Affidavit of Bruce Bromley, February 15, 1963

By the Court's order of January 19, 1963, Toolco was given until 12 noon on January 22, 1963 to produce the documents in question. At the Court's suggestion this date was by stipulation changed to 12 noon on January 23, 1963. Toolco attempted to obtain appellate review of the orders of January 10 and 19 and, particularly, sought a stay of that part of the orders requiring Toolco to produce the allegedly privileged documents pending such review. By stipulation we and other counsel consented to a stay of production until 5 P. M. on January 23, 1963, to enable Toolco to attempt to obtain a review and a further stay from the Court of Appeals for the Second Circuit. Such review was sought by way of notice of appeal under 28 U. S. C. § 1291 and by petition for a writ of mandamus. The appeal was dismissed on [4877] motion and the writ and stay were denied by the Court of Appeals on January 23, 1963. Accordingly, at 5 P. M. on January 23, 1963, we again demanded production of those documents and were again refused. (Attached hereto as Appendix B and made a part hereof is a copy of the transcript of the proceedings before the Special Master of January 23, 1963.)

TOOLCO'S REFUSAL TO PRODUCE THE SO-CALLED TAX DOCUMENTS

As a result of our study of the documents produced by Toolco on March 15, 1962, we were able to ascertain the probable existence of certain other documentary information primarily relating to Toolco's tax returns and financial statements which would, in our view, have established a complete defense to the allegations of the counterclaims. By notice of motion dated January 9, 1963, we moved for the production of such documents for inspection and copy-

ing. On January 22, 1963, the Special Master ordered Toolco to produce such documents. (The Special Master's opinion and order are annexed hereto as Appendix C and made a part hereof.) By order of February 1, 1963, this Court ordered Toolco to produce those documents on a day-to-day basis commencing on February 1, 1963, such production to be completed by February 11, 1963. As the affidavit of Donald I Strauber sworn to February 15, 1963 (attached hereto as Appendix D and made a part hereof) more fully shows, production of those documents in accordance with the Court's order was repeatedly demanded by letter and in person. Finally, on February 8, 1963, counsel for Toolco categorically refused to produce any of those documents and stated that he would not produce them [4878] (Tr. 58-9 of 2/8/63). Thus, those documents have also never been produced. Those documents also were readily available to counsel for Toolco. Indeed, I am informed that certain of the documents which Toolco was ordered to produce were exhibited to the Special Master on February 6, 1963.

TOOLCO'S REFUSAL TO PRODUCE ITS MANAGING AGENT, HOWARD R. HUGHES, FOR EXAMINATION

By notices dated February 14, 1962, the day after this action was commenced against the additional defendants, we noticed the deposition of Toolco by Hughes, its managing agent, for February 21, 1962. (Copies of those notices are annexed hereto as Appendix E and made a part hereof. See also Tr. 1099 *et seq.* of 2/14/62 and Tr. 1108 *et seq.* of 2/15/62 where service of such notices was acknowledged by counsel for Toolco.) The prompt examination of Hughes was critical to our defense against the

counterclaims, since not only was it Hughes' creature, Toolco, which had instigated the litigation against my clients, but it was the activities and eccentricities of Hughes which necessitated the financial and voting trust arrangements which were challenged by Toolco in its counterclaims.

Toolco has never challenged the right of the additional defendants to examine it through Hughes as managing agent, although it has consistently sought to postpone such examination to some undetermined future date.

On the strength of the chronological priority of the notices of February 14, 1962, the additional defendants moved for priority of discovery with respect to the allegations of the counterclaims. That motion was denied by the [4879] Special Master on February 16, 1962 (Tr. 1514-1515). The additional defendants appealed that ruling to this Court. By order of March 5, 1962, this Court granted the application of the additional defendants by modifying the deposition schedule in its previous order of February 7, 1962 (entered before institution of the counterclaims), to the following extent:

> "Defendant Hughes Tool Company may continue the depositions scheduled, limited, however, to evidence which bears on plaintiff's claims against Hughes Tool Company. Since a Special Master is presiding over the depositions on a day-to-day basis, he will see to the application of this limitation. Upon completion of this phase of defendant's depositions, the plaintiff shall proceed with its depositions in the order provided in the pretrial order of February 7, 1962. *The additional defendants may participate in such depositions conducted by plaintiff, in furtherance of their own deposition proceedings.*

> *or may separately schedule such depositions to follow upon the completion of plaintiff's depositions.* At the conclusion of the deposition proceedings by the additional defendants, the defendant Hughes Tool Company may then resume and complete its deposition proceedings." (Emphasis added.)

Thereafter, on September 6, 1962, Chester C. Davis, counsel for Toolco, accepted service of a subpoena duces tecum for Hughes as a witness on behalf of plaintiff, TWA, returnable on September 24, 1962, at the United States District Court House in Los Angeles, California. On September 15, 1962, the additional defendants joined in an application by TWA to the Special Master to suspend the then existing examination schedule so that the deposition of Hughes could be taken commencing on September 24, 1962 (Tr. 63-75 of 9/15/62). The Special Master denied that application. However, at that time the Master said in part:

> [4880] ". . . I am satisfied that there was authority for the service of the subpoena.
>
> "That the subpoena is binding upon Mr. Hughes, and as I construe the subpoena, it is binding upon Mr. Hughes to appear on September 24, 1962, or in the alternative, as fixed by the Court at any other time that the Court lawfully orders Mr. Hughes to appear in the courthouse at Los Angeles.
>
> "I feel that there is such a close connection between Mr. Hughes, as evidenced by some of the documents that I have seen, and the fact that he is the sole owner of the Hughes Tool Company, that the

> Hughes Tool Company is responsible for Mr. Hughes with regard to this subpoena . . ." (Tr. 98.)

That order of the Special Master was appealed and on September 21, 1962, this Court issued an order affirming the Special Master and adjourning the date of the Hughes deposition to October 29, 1962. The Court went on to say:

> "However, in connection with this denial the Special Master directed Chester C. Davis to write to Howard R. Hughes and inform him that the Special Master considered that the subpoena is binding upon Mr. Hughes and that he is subject to appear pursuant to that subpoena on September 24th, 1962 or at any other date fixed by the court. The Special Master stated for reasons set forth in the record that unless Howard R. Hughes communicated with him by today, Friday, September 21st, 1962 he would consider that Mr. Hughes has acquiesced in this interpretation and that if Mr. Hughes subsequently either attacked the validity of the subpoena on September 24th, 1962, or at any future time that the court might direct for the taking of the deposition of Mr. Hughes pursuant to that subpoena, he, the Special Master, would consider the imposition of sanctions upon the Tool Company, and that he would entertain a motion to strike the answer of the Tool Company and enter judgment against it.
>
> "Without passing upon the power of the Special Master to grant the entry of such judgment, the court adopts the interpretation and conditions expressed by the Special Master. Any determination

by the Special Master on the application for a default judgment would, of course, be reviewable upon appeal to the court.

[4881] "On the hearing of this appeal the court inquired of Chester C. Davis as to whether he had followed the directions of the Special Master. Mr. Davis advised the court that he had written to Howard R. Hughes on Monday, September 17th, 1962, and enclosed the pages of the transcript of the hearing before the Special Master on September 15th, 1962 which contained the views of the Special Master. Howard R. Hughes has neither communicated with the Special Master nor the court as of 5:30 p.m. today, which is the end of the business day. Therefore, I find that Mr. Hughes has acquiesced in the interpretation and conditions expressed by the Special Master."

On February 8, 1963, counsel for Toolco stated with respect to the above rulings of the Special Master ". . . the Tool Company did not seek a review of those rulings of the special master by the Court and accepted in effect the responsibility placed upon it by that ruling." (Tr. 9 of 2/8/63).

On October 25, 1962, Toolco sought to adjourn the date for the examination of Hughes beyond October 29, 1962. We opposed that adjournment and asked that a firm date be set for our examination of Hughes (Tr. 48-50 of 10/25/62). The Special Master granted Toolco's application for adjournment, but set February 11, 1963, as a firm date for the Hughes examination (Tr. 53-63 of 10/25/62). At that time the Special Master fixed ten days from that

date as the time for any party to appeal from the order setting the Hughes deposition for February 11, 1963 (Tr. 72 of 10/25/62). Toolco did not appeal.

On December 11, 1962, Toolco brought on before the Special Master a motion to interpose the depositions of A. L. Wadsworth and Ben-Fleming Sessel before the deposition of Hughes. On December 28, 1962, the Special Master rejected that maneuver by Toolco, stating "I am now denying the [4882] application and motion of the Tool Company to depose Mr. Sessel and the Irving Trust Company by Mr. Sessel and Mr. Wadsworth and Dillon, Read & Company, Inc. at any time prior to taking of the deposition of Howard R. Hughes, which is to begin on February 11, 1963." (Tr. 11 of 12/28/62). At the same time the Master referred to his order of October 25, 1962, to clarify it so "that there may be no valid basis for misunderstanding it". (Tr. 8). Toolco then appealed the Master's decision to this Court.

In its order of January 10, 1963, this Court, among other things, affirmed the Master's ruling with respect to the Sessel and Wadsworth depositions and concluded (P. 3) that "the deposition of Howard R. Hughes by the plaintiff and the additional defendants should now go forward". Following the entry of that order, Toolco undertook a variety of stratagems transparently designed further to postpone the date for the Hughes examination, *e.g.*, Toolco's motion to dismiss the complaint; Toolco's "appeal" to the Second Circuit and its petition for a writ of mandamus; and Toolco's motion to stay prosecution of the counterclaims on the basis of its hurried commencement of a proceeding before the Civil Aeronauties Board in order, as this Court noted, "to see if what we claim is

wrong is really allright" (Tr. 27 of 2/8/63). All such diversionary efforts were unavailing. Finally, on February 8, 1963, counsel for Toolco, although accepting on behalf of Toolco the complete responsibility for producing Hughes in response to the notices of the additional defendants and the subpoena of TWA, refused to produce Hughes for either purpose (Tr. 1-63 of 2/8/63).

[4883] CONCLUSION

It is submitted that each separate refusal of Toolco to make discovery, in defiance of the orders of this Court, is independently more than sufficient justification for dismissal of the first five counterclaims with prejudice. It is also submitted that there is no just reason for delay in the entry of such a final judgment.

(Sworn to by Bruce Bromley on February 15, 1963.)

Appendix A, Annexed to Affidavit of Bruce Bromley, February 15, 1963

Transcript of Proceedings, January 14, 1963

[4884]

[CAPTION]

* * *

BEFORE:

HON. J. LEE RANKIN,
Special Master

* * *

[4885]

Hearing on request for production of Toolco's privileged documents, at the offices of Chester C. Davis, Esq., 120 Broadway, New York 5, N. Y., on January 14, 1963, at 11:56 a.m. Reported by Hyman Schneider, a Shorthand Reporter and Notary Public of the State of New York.

[4886] [APPEARANCES:]

* * *

[PRESENT:]

* * *

Mr. Hupper: Let the record show that the time is now 11:56 a.m., and that the various counsel are here to accept production of the so-called privileged documents which by Order of Judge Metzner of January 10, 1963, are to be made available to all parties by noon on January 14, 1963.

Let the record show that we are further here to receive delivery of any lists of further documents in respect of which the Tool Company claims the attorney-client privilege, again as provided in paragraph 4 of Judge Metzner's order of January 10, 1963.

Appendix A, Annexed to Affidavit of Bruce Bromley, February 15, 1963

Transcript of Proceedings, January 14, 1963

Mr. Cook, is the Tool Company prepared to com- [4887] ply with the Order of Judge Metzner of January 10, 1963?

Mr. Cook: Mr. Reporter, please show on the record that Mr. Chester Davis is not present at this time, when the request is being made. I have been shown by his secretary, however, a copy of a letter dated January 14th, from him to Judge Metzner, in which Mr. Davis has made the statement, "The documents have been placed in a sealed envelope and are now in my possession subject to further direction by the Court."

I have also been handed by Mr. Davis' secretary a sealed Manila folder which I suppose is an envelope, and it carries this legend on the face. "January 14, 1963. These are the privileged documents which are producible pursuant to the Special Master's order of September 15, 1962, and the order of the Court dated January 10, 1963, not to be opened except upon further instructions from Mr. Davis."

Construing the two together I do not consider, gentlemen, that I am privileged to turn over these documents to you at this time.

Mr. Hupper: Mr. Cook, can you tell us whether or not Judge Metzner has stayed the effectiveness of [4888] his order of January 10th?

Mr. Cook: I have stated all I know about it, Mr. Hupper.

Mr. Hupper: We understand from all information available to us that there is no such stay outstanding, and that being the case, I again call upon you to produce those documents.

Mr. Cook: I have stated all I know on the record.

Mr. Hupper: I must put you on notice that your failure to produce those documents at this time is in our view, it now being 12 noon exact, a violation of Judge Metzner's

order of January 10, 1963, and we will so treat it in further proceedings before Judge Metzner.

Mr. Giddings: The record should show that Mr. Hupper in his remarks has been speaking for all of the additional defendants, and Mr. Furth advises me also for counsel for TWA.

Mr. Bradner: That is correct.

Mr. Hupper: Mr. Cook, I would also like to request of you whether or not there are any other documents other than those which have previously been supplied to the Special Master, as to which a claim [4889] of privilege has been made, in respect of which the Tool Company now claims an attorney-client privilege?

Mr. Cook: I would prefer for Mr. Davis to answer that Mr. Hupper.

Mr. Hupper: The reason I asked that question is that paragraph 4 of the order of the Court of January 10th requires that the Tool Company provide us at 12 noon on this date with a list of any such other documents. In the absence of any information concerning such documents, or the furnishing of a list, it must be our position that there has been a violation of Judge Metzner's order in that respect also.

Gentlemen, I have nothing further except in accordance with your suggestion. Mr. Furth, I think we ought to request the reporter to prepare this transcript immediately so it can be sent forthwith to Judge Metzner.

Mr. Cook: Is that all?

Mr. Hupper: That is all for the moment.

(Whereupon, the hearing was concluded at 12:04 p. m.)

Appendix B, Annexed to Affidavit of Bruce Bromley, February 15, 1963

Transcript of Proceedings, January 23, 1963

[4891]

[CAPTION]

* * *

BEFORE:

HON. J. LEE RANKIN,
Special Master

[4892]

* * *

Hearing on production of confidential documents held before Hon. J. Lee Rankin, at the offices of Chester C. Davis, Esq., 120 Broadway, New York 5, N. Y., on January 23, 1963, at 5:00 p.m. Reported by Hyman Schneider, a Shorthand Reporter and Notary Public of the State of New York.

[4893] [APPEARANCES:]

* * *

[PRESENT:]

* * *

Mr. Davis: I have just sent a letter to Judge Metzner which I would like to read into the record, and I will have copies for you, sir, and all counsel here, which reads as follows:

"Dear Judge Metzner:

I was unable to obtain an interlocutory review of your order requiring the delivery to opposing

counsel of privileged documents pursuant [4894] to your order dated January 10, 1963 as amended by your order of January 19, 1963 and the stipulations between the parties pertaining thereto. In view of the irreparable injury to my clients which would result from prematurely turning over to opposing counsel such documents, as counsel for Hughes Tool Company I must respectfully decline to comply with your said orders, at least prior to a determination of the motions to dismiss now pending before your Honor.

There would be no objection, of course, to furnishing such documents to your Honor so that you may satisfy yourself that nothing contained therein would be useful in connection with your proper determination of said motions.

Very truly yours."

I have a copy here. I will show this copy to you.

Mr. Barr: Mr. Davis, purely in the interest of making a record, I certainly want to put you on notice that I do consider this to be contempt. I assume that it is deliberately done. May I ask just for the record whether there is any dispute as to whether or not you were as of 5 o'clock this evening [4895] required under the existing orders of the Court to produce these documents for our inspection and copying.

Mr. Davis: There is no question in my mind that the stipulation extending the time within which the Tool Com-

pany could comply with the order of Judge Metzner dated January 19, 1963 expired at 5 o'clock today.

Mr. Barr: I have one other matter.

Mr. Zeller: I would like to note for the record that it seems apparent that Mr. Davis is going to turn to this in regard to the premature turning over of the documents. This is deliberate flagrant contempt of the Court's order. We certainly have to reserve our rights to act accordingly.

Mr. Davis: I appreciate that. So the record may be clear, you should understand that I, as counsel for the Hughes Tool Company, am satisfied that the Court lacks jurisdiction over the subject matter of this action. I recognize that could develop if I was in error, but I feel it is my duty as counsel for the Hughes Tool Company, and I believe I have precedence for this, to refuse to permit any further action on the part of the parties [4896] which would cause any injury to my clients, until after the Court determines the motions which are pending before it, and which establish that there is jurisdiction in the premises.

I know this is not the time and place to argue the merits or lack of merits of such a position, but that is the position.

Mr. Barr: Mr. Davis, again for the record, I take it you do not contest the jurisdiction of the Court over the counterclaims?

Mr. Davis: There are motions to dismiss those counterclaims now pending before the Court. I recognize that you have taken advantage of the existence of that motion for obtaining a ruling that you were not required to answer those counterclaims, and in the form the motion was made by TWA.

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My recollection is a little vague of the extent as to which you supported that position, directly or indirectly before the Court, but whether you did or did not, the fact is that there is pending before the Court, undetermined, a motion to dismiss the counterclaims. By reason of the existence of that motion to dismiss now pending, the additional defendants have not filed any answers to the counter-
[4897] claims within the time prescribed by the rulings.

Mr. Barr: I take it that you are not persuaded by the efficacy of the motion to dismiss, or any motion to dismiss.

Mr. Davis: If the Special Master feels it would be useful for me to engage in any more discussion with Mr. Barr, the matter is adequately stated in the record.

Mr. Barr: I want to be perfectly clear. I think it is to your advantage as well as ours, that we are clear on this—I take it from your remarks that you do not contest the jurisdiction of the counterclaims.

Mr. Davis: You may assume whatever you want to. At present there are motions to dismiss those counterclaims before the Court. I did resist that motion, but I have no decision on it. I will consider what else is involved after I get a decision on those motions.

Mr. Giddings: Mr. Special Master, to complete the record on the question of documents, Judge Metzner's order of January 10th directs that the documents heretofore submitted to the Special Master shall be produced.

[4898] It goes on to state that if there are any additional documents to which the defendant Hughes Tool Company asserts a non-waive attorney-client privilege, such

documents shall be submitted for a ruling to the Special Master by noon of January 14, 1963, and a list thereof furnished at the same time to counsel for all parties.

May I ask through you, Mr. Special Master, whether or not there are such other documents, and whether lists are available?

The Special Master: Mr. Davis.

Mr. Davis: I do not know of the existence of any other documents called for by the rulings of the Special Master heretofore made with respect to the production of documents.

Mr. Zeller: That is not quite the question. The question is whether there are any documents you withheld from production on the grounds of attorney-client privilege.

Mr. Davis: I do not know of the existence of any other documents called for by your Rule 34 motion, which have been withheld on the ground of privilege, that are not in that sealed envelope which I now have, and which represent all the documents that [4899] the Special Master examined. I don't know how clear I can make it.

Mr. Zeller: Well, it is clarified.

[4900] Mr. Barr: Mr. Special Master, for your information you should be informed that we have not received any notification or any indication, or any communication of any sort from counsel of the Tool Company with respect to the place of taking the deposition, and therefore pursuant to the last sentence of Judge Metzner's order of January 19th, which I think perhaps I should read—"Consequently, unless counsel for the defendant indicates

by noon on January 22, 1963, a desire to change the designated place, the deposition shall proceed in the United States Court House in Los Angeles."

We have not received any such indication, and accordingly, pursuant to Judge Metzner's order the deposition will be held at the courthouse.

We are making our arrangements, and for your convenience I want you to be aware of it also.

Mr. Giddings: That applies to the other additional defendants.

Mr. Davis: So no one may take any unnecessary steps, let me say that the Tool Company is not prepared to address itself to whatever problems, if any, exist with respect to the availability of Mr. Hughes at any particular time, until after there [4901] has been a determination of the Tool Company's motion to dismiss.

Mr. Zeller: I take it that deals adequately, in your judgment, Mr. Davis, with that provision of Judge Metzner's order, as well as the provision directing you to produce documents. I take it this is something you thought about very carefully before doing it.

Mr. Davis: I trust that it adequately takes care of all the information that you gentlemen need.

Mr. Zeller: I am talking about the expression of the defiance that you just made.

Mr. Davis: Your characterization of the facts, Mr. Zeller, will not change the facts, and you may describe it as you wish. I am prepared to pursue this matter of dismissal. I am satisfied, not only by my knowledge of the facts, but based upon the complaint, the law as I know it.

the admissions of the plaintiff on the record, that this court does not have jurisdiction over the subject matter of the complaint, and I am satisfied that ultimately that will be the decision.

Therefore, I feel it is my duty to protect my client from a further burden and annoyances which [4902] would be extreme by attempting to make any further arrangements on the assumption that this complaint will continue as a complaint justifying any further proceedings in this action.

Mr. Barr: Mr. Special Master, may I request—we want these documents very badly and we will take whatever steps are available to us.

May I request, sir, and I think that you should immediately inform Judge Metzner at your first opportunity, of contempt of Toolco's counsel so that the Court can take whatever proceedings it deems advisable under the circumstances.

The Special Master: If you ask that this transcript be transcribed promptly, and be sent to Judge Metzner, I will so direct.

Mr. Barr: I do so request. In view of the fact that the contempt has occurred, that you, sir, at your first convenient opportunity, should inform the Court that its order is being held in contempt by the Tool Company.

The Special Master: I shall do so. I assume that any action concerning the contempt will be taken before Judge Metzner.

Mr. Barr: I have been running that over in my [4903] head, sir, and I believe this is his order, and it is before him.

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The Special Master: I am not sure what the status of it is. I think it is an affirmance of my order, but you will have to figure out what you think is the proper thing to do, and I will be available.

I do regard it as a contempt. Mr. Davis, I appreciate your position that you claim the Court does not have jurisdiction of the subject matter. I am not sure that that will protect you if the Court during its deliberations has to have a reasonable time to determine that fact, if prior to the time it determines that fact you fail to comply with the Court's orders.

Furthermore, I wish to call to your attention that even though you would maintain your position that the Court does not have jurisdiction of the subject matter insofar as the complaint is concerned, the counterclaims may very well be independent as far as the law is concerned, and this order bears both upon the counterclaims and the complaint, so that the contempt may be valid for failure to produce with regard to the counterclaims even if the Court should find [4904] finally that the complaint should be dismissed because it does not have jurisdiction of the subject matter.

I bring that to your attention so that you will not overlook it, and act in such a way as to bring great injury to your client without at least having it in mind.

Mr. Davis: These are matters which I have had in mind, Mr. Special Master, which have been very carefully considered by me.

The fact remains that those counterclaims are currently subject to a motion to dismiss, whatever the grounds, and that until the Court has acted upon those pending mo-

tions to dismiss, I believe that I am not only justified, but it is my duty to resist further discovery on the basis of the complaint or counterclaims until those pending motions are decided in such a way so as to determine the questions that are involved.

I hand you a copy of the letter that I sent to Judge Metzner, sir. May the record show that I am handing you gentlemen a copy thereof at this time?

Mr. Barr: Mr. Special Master, just so there will be no doubt on the record, I construe Judge Metzner's order as requiring the production for each [4905] of us individually, and the right of the plaintiff to receive the documents and the right of any of the additional defendants is equal, but separate.

But so that there will be no doubt on that question, may I ask you to direct the Tool Company to produce those documents only for the additional defendants.

The Special Master: I so direct.

Mr. Davis: The position of the Tool Company remains the same, Mr. Special Master.

[4906] The Special Master: I want to call your attention, Mr. Davis—this may be gratuitous on my part—this is a serious action and I am sure you are well aware of that —of the fact that your requests for stays of this action during the efforts to take various action, until the Court will act concerning your motion to dismiss, or for summary judgment, have all been denied, as I understand it, and I think that has an important bearing upon the question of your duty to comply with the order. I merely call it to your attention——

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Mr. Davis: That may be unless those orders are errors as a matter of law. Insofar as the stays involved are concerned, they were for a review of these interlocutory orders, which I did not obtain, since the application for review of the interlocutory orders were denied, or at least the decisions covered both.

I am aware of the fact that I had previously made an application to Judge Metzner for a stay with respect to the application of the provisions relating to the production of the privileged documents. I am aware of those matters.

The Special Master: I do not mean to argue [4907] the matter with you, Mr. Davis, and I am sure you do not mean to.

I am just trying to make sure that you are not overlooking any of these things which I think have a serious bearing upon the whole question.

Mr. Davis: I have tried not to overlook anything.

Mr. Barr: Let me say again so that this record is clear, that whatever the appeals, the Second Circuit, this afternoon at about 4:00 o'clock, denied Mr. Davis' application for a stay of Judge Metzner's order requiring him to produce those documents, which have been extended by stipulation until 5:00 o'clock.

It denied his petition for leave to file a petition for mandamus, and it dismissed the appeal that he took yesterday afternoon—that the Tool Company took yesterday afternoon—with respect to both of Judge Metzner's orders of the 10th and the 19th of January.

So that there is no motion of any sort pending with respect to either of Judge Metzner's orders, or with respect to the privileged documents.

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The Special Master: Mr. Zeller.

[4908] Mr. Zeller: There is one other matter I would like to turn to, if I may, Mr. Special Master, and that is to the order which your Honor recently issued requiring the production of what we might call the tax documents, for lack of a better shorthand expression.

I would like your Honor to direct at this time that at the time of production of those documents, that any documents called for by that motion which the Tool Company desires to withhold under a claim of attorney-client privilege be submitted to your Honor for consideration and a ruling, and that a list of such documents be furnished at the same time to us.

The Special Master: Mr. Zeller, I am not clear—maybe you can help me—as to whether there is anything open that the Tool Company could claim a privilege on.

Mr. Zeller: I don't know. It is the way Mr. Davis responded earlier on this question, your Honor, when we asked him whether there were any other documents being withheld on grounds of attorney-client privilege.

His response was, if you will recall, that there were no documents called for in our original [4909] Rule 34 motion which he was withholding on grounds of attorney-client privilege.

A new category has been opened up by your Honor's granting of the additional Rule 34 motion here recently.

It may well be, and I suspect it will be, that there will be documents called for in those categories which the Tool Company will assert a claim of attorney-client privilege on.

My request is simply for a direction that if that be the case, that the documents against which any such claim be

asserted, be submitted to your Honor at the same time production is made to us of the clearly non-privileged documents, and that we be given a list of the documents as to which the claim is made.

The Special Master: Mr. Davis, do you wish to comment on that request?

Mr. Davis: May I say this, Mr. Special Master: I am informed that it would be physically impossible to gather the documents covered by your last ruling with respect to the production of documents within the time specified therein, irrespective of any other objections that we may have.

[4910] I base that upon information I received from Mr. Cook that it would take weeks to try to gather all of the material called for if the Tool Company were in fact properly required to produce such material.

Therefore, at this juncture I know of no claim of attorney-client privilege with respect to the material called for.

I haven't the slightest idea whether there would exist or would not exist any document which would fall into the category of attorney-client privilege when that is done.

But to be sure, some of those documents would be located fairly soon, but to produce all that were called for would not be feasible within the time allowed.

May I also state that it will be our intention to seek a review of the ruling, and of course, we also are confronted with the position which the Tool Company has indicated today it intends to take and maintain, until after there has been a determination of the motions pending before the Court.

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I am not going to try at this time to address myself to all those various things, but I have given [4911] you at this time all that I know on the subject.

The Special Master: I will grant your request then, and direct that the Tool Company furnish such documents and lists thereof at the time of production.

You may incorporate that in your request for a review, if you like.

Is there anything further, gentlemen?

Mr. Zeller: I think that is it.

(Whereupon, at 5:30 p. m., the hearing was closed)

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[4913]

[CAPTION]

[APPEARANCES]

* * *

[4914] Defendants Equitable Life Assurance Society of the United States, Metropolitan Life Insurance Company, James F. Oates, Jr. and Harry C. Hagerty moved for an order pursuant to Rule 34 of the Federal Rules of Civil Procedure directing the defendant, Hughes Tool Company, to produce and to permit said additional defendants to inspect and copy each of the documents designated in the schedule annexed to the affidavit of John R. Hupper and attached to said motion, subject to whatever protective relief under the protective order of March 21, 1962 the Special Master might deem proper. In the schedule referred to the documentary evidence requested consisted of various writings in the possession, custody or control of Hughes Tool Company and [4915] any concern or person associated at any time with Hughes Tool Company, including its sole stockholder, pertaining to the period from 1939 to date and relating directly or indirectly to:

(a) Dividends or other payments made to Toolco's stockholder or any discussions or decisions made as to whether or not to pay dividends to Toolco's stockholder.

(b) Any accumulation or retention of earnings or profits by Toolco.

(c) Any conferences or communications with any official or agent of the Internal Revenue Service or any other government official, agent or agency relating to the payment of, or failure to pay, dividends by Toolco or to the retention or accumulation of earnings or profits by Toolco.

(d) Any penalty, assessment or deficiency, or any possibility of such, made by, or discussed with, the Internal Revenue Service or any governmental official, agent or agency, by reason of any accumulation or retention of taxable earnings or profit by Toolco.

(e) Any justification made or considered by Toolco for the retention or accumulation of taxable earnings or profits with respect to Section 531 of the Internal Revenue Code (Section 102 of the 1939 Code).

(f) The desirability of financing Trans World Airlines, Inc. ("TWA") or Northeast Airlines, Inc. ("NEA") equipment needs through debt or equity from the standpoint of Toolco, TWA, NEA or any other person.

[4916] (g) The desirability or undesirability of TWA or NEA maintaining any particular debt-equity ratio or any particular capital structure, from the standpoint of Toolco, TWA, NEA or any other person.

(h) The desirability or effect of any TWA or NEA dependency upon Toolco's financial resources or the financial effect of permitting TWA or NEA to be dependent upon Toolco's financial resources, from the standpoint of Toolco, TWA, NEA or any other person.

(i) The depreciation taken or available to be taken by Toolco or TWA or NEA for internal accounting, income tax or any other purpose on any flight equipment acquired or to be acquired.

(j) The Final Accounting and Debenture Purchase Agreement, including Exhibit A thereto, between TWA and Toolco dated July 21, 1960 and the computations reflected therein.

(k) The Final Accounting and Debenture Purchase Agreement, including Exhibit A thereto, between Toolco and TWA dated December 29, 1960 and the computations reflected therein.

(l) The Final Accounting and Debenture Purchase Agreement, including Exhibit A thereto, between Toolco and TWA dated December 30, 1960 and the computations reflected therein.

[4917] (m) The letter agreement dated May 9, 1960 between Toolco and TWA entitled "Purchase of Boeing Model 707-131 and 707-331 Jet Aircraft and Convair Model 880 Jet Aircraft".

(n) The determination of the amount of rental payments to be made by TWA to Toolco for Boeing 707-131's and Boeing 707-331's leased by Toolco to TWA in 1959 and 1960.

(o) The method of accounting for all such rental payments internally, for income tax or for any other purpose.

(p) Any and all moneys borrowed by Toolco and the interest rate thereon.

(q) Any and all interest or interest factors charged to TWA by Toolco and the method used for computing such interest or interest factors.

(r) Any capital gains realized by Toolco on the sale of any flight equipment.

(s) Any gain of any sort realized by Toolco on the sale of any flight equipment.

(t) The desirability and financial effect of any method of selling or purchasing or financing or leasing any aircraft by Toolco or TWA or NEA, from the standpoint of Toolco, TWA, NEA, or any other person.

[4918] (u) All payments made by Toolco to manufacturers or others in connection with the procurement of aircraft.

(v) All Toolco Federal Income Tax Returns, including all supporting schedules, for the years 1961 and 1962.

(w) All Toolco financial statements for 1961 and its quarterly statements for 1962, including all supporting schedules.

In accordance with the practice in this case, the plaintiff and the additional defendants Irving Trust Company and Ben-Fleming Sessel, Dillon, Read & Co. Inc. and Charles C. Tillinghast, Jr., joined in the motion and re-

quested that if such documents were required to be produced under the motion for such other additional defendants, that they also be required to be produced for them and that they be permitted to inspect and copy each of the documents designated in the schedule annexed to the affidavit of John R. Hupper.

In support of the motion, Mr. Hupper sets forth in his affidavit that the documents requested are directly related to the allegations set forth in Toolco's counterclaims and the fact that such documents probably exist recently came to the attention of the moving defendants through a preliminary study of the Toolco's financial statements and income tax returns previously produced for inspection and copying pursuant to orders of the Court and the Special Master.

[4919] The proof further claims that a study of such tax returns and financial statements caused it to appear that Toolco may have taken advantage of its dominance over the affairs of TWA to profit at TWA's expense and to arrange transactions between itself and TWA so as to achieve tax and other benefits for itself at TWA's expense, and that proof of such facts would controvert the allegations of the counterclaims to the effect that Toolco's participation in the financial arrangements involving TWA were designed to benefit TWA and were in its best interest. Mr. Hupper also asserted that such proof would confirm the justification for the moving defendants' unwillingness to lend many millions of dollars to finance the acquisition of aircraft for use by TWA without assurances that TWA would control such aircraft and that TWA would have a management in which said defendants had confidence.

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An example given is the sale by Toolco to TWA on December 30, 1960 of 19 Boeing 707 aircraft, which TWA had been forced to lease from Toolco at rates of $2500 per day and more, and in some instances for more than a year, as a result of Toolco's previous refusal to agree to the consummation of arrangements whereby TWA might purchase such aircraft. It is also asserted that Toolco, through complex financial arrangements completed on December 30, was able to profit directly from the sale of the Boeing aircraft to TWA in an amount in excess of $11,000,000.

[4920] Mr. Hupper also states that it appears from Toolco's tax returns that it was able to reap substantial benefits through its ability to take for tax purposes accelerated depreciation on the 19 Boeing 707 aircraft leased by it to TWA, and that because of Toolco's insistence on a leasing program TWA was deprived of the benefits of such depreciation. It is further stated that TWA was finally permitted to purchase the aircraft from Toolco in December 1960, but at that time depreciation was credited to TWA in calculating the purchase price on a straight-line basis, rather than in accordance with the accelerated computation employed by Toolco.

Mr. Hupper also asserts that it appears in connection with the sale of jet planes to TWA that Toolco was able for tax purposes to convert substantial amounts of ordinary income into capital gain, in part by offsetting depreciation charges against Toolco's ordinary income while the Tool Company was leasing the planes to TWA and then reducing Toolco's cost basis by the amount of such depreciation

when calculating its capital gain on the sale of the planes and a like procedure was followed in converting interest charges to capital gains. It is asserted that these items of capital gain resulting from such action appeared to involve millions of dollars.

It is also stated in the affidavit that according to the evidence available Toolco has for many years arranged TWA's equipment transactions so as to achieve substantial tax savings for [4921] it irrespective of TWA's best interest, and an example is given from the testimony of Mr. Rummel regarding Mr. Hughes' insistence that a contract for a certain Lockheed 1694 aircraft be completed in December 1954 over the objection of Mr. Rummel that specifications for the aircraft had not been sufficiently developed to make a firm contract advisable.

It is also asserted that Toolco's financial statement for 1954 shows a $17,000,000 payment made by it to Lockheed on account of such aircraft, and that since the net income of Toolco, after taxes, for 1954 was in excess of $20,000,000, the payment of the $17,000,000 in that year was for the purpose of obviating Mr. Hughes' Section 102 tax problem and that except for such arrangements, possibly to the detriment of TWA, very substantial penalties might well have been assessed against Toolco under Section 531 of the Internal Revenue Code (Section 102 of the 1939 Code). Mr. Hupper states that although it is impossible from the limited information now available to ascertain the exact amount of such benefits which Toolco obtained from this and similar transactions involving TWA's equipment

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needs, the total may well exceed $25,000,000 as it now appears.

It is also asserted that the detailed information requested in the schedule is of crucial importance in connection with the forthcoming examination of Mr. Hughes scheduled for February 11, 1963.

[4922] Toolco objected to the granting of the motion on two grounds; one that until the court has ruled upon its motion to dismiss the complaint on the ground of lack of jurisdiction and other grounds described in its motion to dismiss, and until the court ruled upon the motion to dismiss the counterclaims made by the plaintiff, which latter motion is now under submission, the motion for production of these documents should be denied.

The motion was argued at length before the Special Master on January 17, 1963 and at that time after extended argument, the Special Master took a submission of the motions and opposition thereto and stated that he would rule upon them after Judge Metzner had decided the questions then before him. These were a motion in the alternative by Toolco for an order pursuant to Rule 30(b) of the Federal Rules of Civil Procedure that the deposition of Howard R. Hughes be taken on written interrogatories, or in the alternative that if such relief pursuant to Rule 30(b) was denied, that the motions of Toolco to dismiss the complaint or for summary judgment pursuant to Rules 12(b) and 56(b) be brought on for a hearing and determination, and that the order of the court dated January 10, 1963 requiring certain documents to be turned over to the

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plaintiff be stayed until the determination of the motions to dismiss or for summary judgment.

On January 19, 1963 Judge Metzner ruled on the aforesaid motions of Toolco and denied the application to take the deposition of Howard R. Hughes on written interrogatories, agreed to taking a submission of the motion to dismiss and a motion for summary judgment in accordance with the schedule set for the 1st [4923] of February; and denied the application to stay the order of January 10th for the production of documents, except that he modified the date of January 14th to be extended to January 22nd.

The Special Master finds that good cause has been shown for the production of the documents requested and that the motion of the respective parties should be sustained and the documents described in the schedule attached to the motion be produced for inspection and copying by the plaintiff and all of the additional defendants.

It is quite apparent that the documentary evidence requested is relevant to the inquiries in this case. The claim that Toolco's 102 problems and the profits that Toolco obtained by reason of its relations with TWA in the procurement and financing of equipment is not a novel contention in this case. It was asserted a number of months ago by the plaintiff in these proceedings.

It is also obvious that the materials now requested might be important and quite necessary in illuminating, explaining and supporting information either partially or fully set forth in the financial statements and the income tax returns of Toolco that Judge Metzner ordered Toolco to produce in his order of December 18, 1961, calling for their production for March 15, 1962.

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While it is recognized that the effort to produce such information by the Tool Company at this time is a burden, it is not under all of the circumstances an unreasonable one and in [4924] fact in view of the importance of such materials to this litigation, it is found that the requirement to produce it is in fact reasonable.

The importance of having the requested documentary materials prior to the taking of the deposition of Mr. Hughes is obvious. It would appear that employees and counsel at Houston, Texas, who have for many years represented Toolco generally, as well as in its tax matters, could assist in the production to such an extent that the burden upon Mr. Chester C. Davis and his associates in connection therewith should not be great.

Concerning the objection that the production be denied until the disposition of the motion to dismiss the complaint or for summary judgment, and the motion to dismiss the counterclaims is ruled upon, such suggestions do not appear to have validity, and especially so on consideration of the rulings of the court and the practice that has been followed of requiring production in this litigation. Such rulings and practice demonstrates the position of the court throughout to have been to give each and all parties every reasonable opportunity to secure documentary evidence that might be relevant or lead to relevant evidence either for the party taking depositions at the time or to those not taking depositions to prepare themselves for the time when they would have their turn. There is nothing about the motion to dismiss the complaint, or for summary judgment, or for a motion to dismiss the counterclaims that should interfere

with such an approach to the development of the essential facts in this litigation.

[4925] The Special Master back as far as October 25, 1962 in setting the deposition of Howard R. Hughes over to February 11, 1963 referred to the fact that there would be ample opportunity in the interim for Toolco "to present whatever motions it cared to to the court with regard to the jurisdiction of the court over the subject matter and elements of primary jurisdiction or other legal issues of that character * * *". In view of the time that has expired since that date the presentation now of such motions should not be allowed to interfere with the taking of Mr. Hughes deposition on the date assigned and the opportunity of counsel in examining Mr. Hughes to be fully informed by such material as is described in the schedule attached to the motions which is under the custody and control of the Tool Company or other persons described in said motion.

It is, therefore, ordered that subject to and in accordance with the protective order of the Special Master of March 21, 1962, the motion is sustained and the defendant Hughes Tool Company is ordered to produce the documents described in the schedule attached to the motion on January 30, 1963.

It is further ordered that any review of this order be taken by filing papers in the United States District Court for the Southern District of New York before 5:00 P. M., January 25, 1963.

Dated: New York, New York
22nd day of January, 1963.

J. LEE RANKIN
Special Master

Appendix D, Annexed to Affidavit of Bruce Bromley, February 15, 1963

Affidavit of Donald I Strauber, February 15, 1963

[4927]

[CAPTION]

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

DONALD I STRAUBER, being duly sworn, deposes and says:

1. I am an attorney associated with the firm of Cravath, Swaine & Moore, attorneys for additional defendants The Equitable Life Assurance Society of the United States ("Equitable"), Metropolitan Life Insurance Company ("Metropolitan"), James F. Oates, Jr. ("Oates") and Harry C. Hagerty ("Hagerty").

2. This affidavit is submitted as a supplement to the affidavit of Bruce Bromley dated February 15, 1963, which is submitted in support of (1) a motion by said additional defendants pursuant to Rules 37(b)(2), 37(d), 41(b) and 41(c) [4928] for an order dismissing the counterclaims herein with respect to said additional defendants with prejudice and (2) an application by said additional defendants for immediate entry of judgment dismissing the counterclaims pursuant to Rule 54(b) and for an express determination that there is no just reason for delay of the entry of such judgment.

3. On January 17, 1963, upon (a) the affidavit of John R. Hupper, sworn to January 9, 1963, (b) the

Appendix D, Annexed to Affidavit of Bruce Bromley, February 15, 1963

Affidavit of Donald I Strauber, February 15, 1963

Haskins & Sells accountants' reports to defendant Hughes Tool Company ("Toolco") for the years 1939-1960 and the federal income tax returns of defendant Toolco for the years 1939-1960, previously produced and incorporated by reference, and (c) all prior proceedings, additional defendants Equitable, Metropolitan, Oates and Hagerty, moved before the Special Master, J. Lee Rankin, Esq. for an order pursuant to Rule 34 of the Federal Rules of Civil Procedure directing defendant Toolco to produce and to permit said additional defendants to inspect and copy each of the documents designated in the schedule annexed to the said affidavit of John R. Hupper. (The notice of motion is annexed hereto as Exhibit B.)

4. By order dated January 22, 1963, which order is annexed to the affidavit of Bruce Bromley as Appendix C, the Special Master granted said motion and ordered defendant Toolco to produce to all the additional defendants, on January 30, 1963, the documents described in the schedule attached to said motion.

5. By pre-trial order dated February 1, 1963, the Court affirmed said January 22, 1963, order of the Special Master and ordered Toolco to produce said documents on a daily basis commencing on February 1, 1963, and to be com- [4929] pleted on or before February 11, 1963. None of such documents was ever produced for any of the parties.

6. By letter dated February 6, 1963, from John R. Hupper to Chester C. Davis, which is annexed hereto as

Appendix D, Annexed to Affidavit of Bruce Bromley, February 15, 1963

Affidavit of Donald I Strauber, February 15, 1963

Exhibit A, additional defendants Equitable, Metropolitan, Oates and Hagerty joined in the request contained in a letter from John F. Sonnett to Chester C. Davis dated February 5, 1963, that Toolco produce for inspection and copying no later than 5 p. m., February 6, at least the 1961 and 1962 tax returns and financial statements of Toolco which had been ordered produced as described in subparagraphs (v) and (w) in the Special Master's order as affirmed by the Court.

7. On Wednesday, February 6, 1963, at 4:45 p. m., Nazeeh S. Habashy, Esq., a law clerk employed by Cahill, Gordon, Reindel & Ohl, and I went to the offices of Chester C. Davis, counsel for Toolco. We talked with Mr. William Grainger who, we were told, was the only attorney representing Toolco then present.

8. On behalf of all the additional defendants I requested the production for inspection and copying of (a) the documents which Toolco was ordered to produce by the Special Master's order of January 22, 1963, and (b) at least the 1961 and 1962 tax returns and financial statements of Toolco as described in subparagraphs (v) and (w) in the Special Master's order dated January 22, 1963, and referred to in the letter dated February 6, 1963, from Mr. Hupper to Mr. Davis.

9. Mr. Grainger refused to comply with those [4930] requests, stating that the requests should be made of Mr. Davis or Mr. Cook, neither of whom was present.

(Sworn to by Donald I Strauber on February 15, 1963.)

Appendix D, Annexed to Affidavit of Bruce Bromley, February 15 1963

Exhibit A, Annexed to Affidavit of Donald I Strauber, February 15, 1963

[4931]

[Letterhead of]

CRAVATH, SWAINE & MOORE

February 6, 1963

TWA v. Hughes

Dear Mr. Davis:

We are in receipt of Mr. Sonnett's letter to you of February 5, 1693 concerning production of the confidential documents.

We join in the request that you produce to us for inspection and copying no later than 5:00 p.m. today at least the 1961 and 1962 tax returns and financial statements of the Hughes Tool Company which have been ordered produced as described in subparagraphs (v) and (w) in the Special Master's order dated January 22, 1963 and affirmed by the court by its order of February 1, 1963.

Very truly yours,

JOHN R. HUPPER

CHESTER C. DAVIS, ESQ.,
120 Broadway,
New York 5, N. Y.

JJ

BY HAND

Copy to all counsel.

Appendix D, Annexed to Affidavit of Bruce Bromley, February 15, 1963

Exhibit B, Annexed to Affidavit of Donald I Strauber, February 15, 1963

[4932]

[CAPTION]

SIRS:

PLEASE TAKE NOTICE that upon (a) the annexed affidavit of John R. Hupper sworn to January 9, 1963, (b) the Haskins & Sells accountants' reports to defendant Hughes Tool Company for the years 1939-1961 and the federal income tax returns of defendant Hughes Tool Company for the years 1939-1961, previously produced and incorporated herein by reference, and (c) all prior proceedings herein, the undersigned will move the Special Master, J. Lee Rankin, Esq., at 10:00 a.m. on January 17, 1963, in Room 3113 at 120 Broadway, New York 5, N. Y., for an order pursuant to Rule 34 of the Federal Rules of Civil Procedure directing defendant Hughes Tool Company to produce and, to permit the additional defendants The Equitable Life Assurance Society Of The United States, Metropolitan Life Insurance Company, James F. Oates, Jr. and Harry C. [4933] Hagerty to inspect and copy each of the documents designated in the schedule annexed to the said affidavit of John R. Hupper, subject to whatever protective relief under

the protective order of March 21, 1962 the Special Master may deem proper.

January 9, 1963

CRAVATH, SWAINE & MOORE

by JOHN R. HUPPER
A Member of Said Firm

Attorneys for Additional Defendants Equitable Life Assurance Society of the United States, Metropolitan Life Insurance Company, James F. Oates, Jr. and Harry C. Hagerty,
1 Chase Manhattan Plaza,
New York 5, N. Y.

Appendix D, Annexed to Affidavit of Bruce Bromley, February 15, 1963

Exhibit B, Annexed to Affidavit of Donald I Strauber, February 15, 1963

[4934]

The affidavit of John R. Hupper and annexed schedule in support of the Rule 34 Motion contains material covered by the Protective Order of the Special Master dated March 21, 1962. It is on file with the Special Master but is not annexed to this copy.

Appendix E, Annexed to Affidavit of Bruce Bromley, February 15, 1963

Notice of Taking Depositions of Toolco by Hughes and Holliday, dated February 14, 1962

[4935]

[CAPTION]

SIR:

PLEASE TAKE NOTICE that, pursuant to the Federal Rules of Civil Procedure, additional defendants Equitable Life Assurance Society of the United States and Metropolitan Life Insurance Company demand that defendant Hughes Tool Company by Howard R. Hughes, its Managing Agent, who, on information and belief resides in the State of California, and Raymond M. Holliday, its Vice President, who, on information and belief resides in the State of Texas, appear on February 21, 1962, at ten o'clock in the forenoon, at Room 891, United States Court House, Foley Square, New York, New York, at which time and place additional defendants Equitable Life Assurance Society of the United States and Metropolitan Life Insurance Company will take their depositions upon oral examination before an officer [4936] duly authorized by law to take depositions. The examination will continue from day to

Appendix E, Annexed to Affidavit of Bruce Bromley, February 15, 1963

Notice of Taking Depositions of Toolco by Hughes and Holliday, dated February 14, 1962

day until completed. You are invited to attend and cross-examine.

February 14, 1962.

CRAVATH, SWAINE & MOORE,

by ALLEN F. MAULSBY
a member of the firm

Attorneys for said additional defendants,
1 Chase Manhattan Plaza,
New York 5, N. Y.

Appendix E, Annexed to Affidavit of Bruce Bromley, February 15, 1963

Notice of Taking Depositions of Toolco by Hughes and Holliday, dated February 14, 1962

[4937]

[CAPTION]

SIR:

PLEASE TAKE NOTICE that, pursuant to the Federal Rules of Civil Procedure, additional defendants James F. Oates, Jr. and Harry C. Hagerty demand that defendant Hughes Tool Company by Howard R. Hughes, its Managing Agent, who, on information and belief resides in the State of California, and Raymond M. Holliday, its Vice President, who, on information and belief reside in the State of Texas, appear on February 21, 1962, at ten o'clock in the forenoon, at Room 601, United States Court House, Foley Square, New York, New York, at which time and place additional defendants Equitable Life Assurance Society of the United States and Metropolitan Life Insurance Company will take their [4938] depositions upon oral examination before an officer duly authorized by law to take depositions. The examination will continue from day

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Notice of Taking Depositions of Toolco by Hughes and Holliday, dated February 14, 1962

to day until completed. You are invited to attend and cross-examine.

February 14, 1962.

CRAVATH, SWAINE & MOORE,

by JOHN R. HUPPER
a member of the firm

Attorneys for additional defendants,
1 Chase Manhattan Plaza,
New York 5, N. Y.

Appendix F, Annexed to Affidavit of Bruce Bromley, February 15, 1963

Notice of Motion, February 14, 1962

[4939]

[CAPTION]

SIR:

PLEASE TAKE NOTICE that upon the complaint, the answer and counterclaims of defendant Hughes Tool Company, the order of Judge Charles M. Metzner dated February 7, 1962, the annexed affidavit of Bruce Bromley, and all prior proceedings herein, the undersigned will move the Special Master, J. Lee Rankin, Esq., at such time and place as the Special Master shall designate for an order pursuant to Rule 34 of the Federal Rules of Civil Procedure directing defendant Hughes Tool Company to produce and to permit additional defendants The Equitable Life Assurance Society of the United States, Metropolitan Life Insurance Company, James F. Oates, Jr. and Harry C. Hagerty to inspect and copy [4940] each of the documents designated in the schedule annexed to the said affidavit of Bruce Bromley.

PLEASE TAKE FURTHER NOTICE that the above-named additional defendants will also move the Special Master at the same time and place for an order quashing the subpoenas duces tecum and ad testificandum heretofore served on the above-named defendants upon the grounds that the discovery and inspection which defendant Hughes Tool Company seeks thereby to obtain is improper in that plaintiff has failed to make application pursuant to, or to comply

Appendix F, Annexed to Affidavit of Bruce Bromley, February 15, 1963

Notice of Motion, February 14, 1962

with the provisions of, Rules 26 and 34 of the Federal Rules of Civil Procedure.

PLEASE TAKE FURTHER NOTICE that the above-named additional defendants will also move the Special Master at the same time and place for a further order granting to the above-named additional defendants priority of discovery with respect to the allegations of the counterclaims and for such other and further relief as to the Special Master shall seem just.

February 14, 1962

CRAVATH, SWAINE & MOORE

by /s/ BRUCE BROMLEY
a member of said firm

Attorneys for additional defendants.
The Equitable Life Assurance Society of the United States, Metropolitan Life Insurance Company, James F. Oates, Jr., Harry C. Hagerty
1 Chase Manhattan Plaza
New York 5, N. Y.

[4942]

Appendix F, Annexed to Affidavit of Bruce Bromley, February 15, 1963

Affidavit of Bruce Bromley, Annexed to Notice of Motion, February 14, 1962

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

BRUCE BROMLEY, being duly sworn, deposes and says:

1. I am an attorney-at-law and a member of the firm of Cravath, Swaine & Moore, attorneys for additional defendants The Equitable Life Assurance Society of the United States, Metropolitan Life Insurance Company, James F. Oates, Jr., and Harry C. Hagerty.

2. I make this affidavit in support of such additional defendants' motion pursuant to Rule 34 of the Federal Rules of Civil Procedure for an order directing the production and copying of certain documents in the possession, [4943] custody and control of defendant Hughes Tool Company (Toolco) and described in the schedule annexed hereto. This affidavit is also submitted in support of the above-named additional defendants' request for priority of discovery with respect to the counterclaims set forth by Toolco in its answer and counterclaims filed February 13, 1962 and for an order quashing the subpoenas duces tecum and ad testificandum heretofore served on the above-named additional defendants.

Appendix F, Annexed to Affidavit of Bruce Bromley, February 15, 1963

Affidavit of Bruce Bromley, Annexed to Notice of Motion, February 14, 1962

3. The documents set forth in the annexed schedule are all directly related to the allegations set forth in Toolco's counterclaims. It is our intention to follow this Rule 34 motion, assuming it is granted, by a request, as soon as such can be adequately prepared, for answers to interrogatories.

4. It is the intention of the above-named additional defendants in seeking this discovery, not to hinder or disrupt the progress of this case in any manner, but rather to enable such additional defendants to prepare properly to defend and at the same time avoid a halt in the proceedings. It is our view that the joining of additional defendants should not serve as a justification for any delay whatsoever. Rather, with some assistance from the Special Master and the parties, we are prepared to take up a full share of our burden as parties.

5. There are two traditional tests for determining priority of discovery. The first is a chronological test which depends upon the swiftness of the adversaries in serving papers. The second, and more important test, is that priority should be established in such a manner as to [4944] facilitate the most expeditious determination of the controversy. It is quite clear that the additional defendants named above have established chronological priority. To facilitate expeditious determination of this litigation two factors must be weighed. First, it is important to all the parties that depositions presently scheduled be continued pursuant to the order of the Court. Second, it is necessary that the

additional parties brought in by Toolco should be enabled to prepare and properly to protect their interests. The additional defendants must obtain necessary factual information to assess the validity of Toolco's claims, to determine what motions, if any, should be filed and to prepare appropriate replies to the counterclaims. At the same time, those additional defendants must cope with the day-to-day schedule of depositions for which the present parties are already prepared by virtue of eight months of preparation and the discovery proceedings which have thus far taken place. If we are to have a full opportunity to participate in the proceedings without the necessity of delay, we must be accorded some priority in discovery.

6. In that spirit, I propose the following:

(a) the above-named additional defendants Rule 34 motion be granted and production of documents by Toolco should take place within ten days after the granting of such motion;

(b) Equitable and Metropolitan will make available to Toolco such documents as it seeks pursuant to a proper Rule 34 motion within ten days after such motion is granted;

(c) If at any time either plaintiff or Toolco [4945] is unable to go ahead with a scheduled deposition, we will, on reasonable notice, be prepared to examine Toolco by Howard R. Hughes and Raymond M. Holliday pursuant to notice of February 14, 1962;

(d) as rapidly as possible the above-named additional defendants will prepare and serve upon Toolco written interrogatories. Those interrogatories should be answered promptly.

7. I fully understand and appreciate the complications which the addition of more parties to this litigation engenders. However, such complications have been brought about solely through the design of Toolco, which has for many months been stating that it would sue the lending institutions. I believe that, in view of all the facts, the proposals made above are fair and reasonable to all parties.

(Sworn to by Bruce Bromley on February 15, 1962.)

Appendix F, Annexed to Affidavit of Bruce Bromley, February 15, 1963

Schedule Annexed to Affidavit of Bruce Bromley, Annexed to Notice of Motion, February 14, 1962

[4946] SCHEDULE TO MOTION TO PRODUCE

I. All (and all copies of) books, records, memoranda, letters, minutes, reports, studies, contracts, agreements, leases, indentures, registration statements, applications, diaries, diary entries, appointment calendars, transcriptions (including but not limited to electrical or mechanical transcriptions), statements, working papers, drafts and other documents or writings in the possession, custody or control of Hughes Tool Company, ("Toolco" hereinafter refers to Hughes Tool Company, and any concern or person associated at any time with Hughes Tool Company, including its sole stockholder), pertaining to the period from 1939 to date and relating directly or indirectly to:

(a) The needs of TWA for flight equipment, the acquisition or contemplated acquisition by TWA or by Toolco of flight equipment, any participation or contemplated participation by TWA or Toolco in the development, manufacture or supply of flight equipment, any arrangement or contemplated arrangement for the financing by TWA or Toolco, or both, of flight equipment or of the operations of TWA, including but not limited to negotiations, discussions or conferences with respect to the foregoing between or among Toolco, TWA, any person associated with TWA, any supplier of flight equipment, any financial adviser to TWA or to Toolco, or any bank, insurance company or other financial institution;

Appendix F, Annexed to Affidavit of Bruce Bromley, February 15, 1963

Schedule Annexed to Affidavit of Bruce Bromley, Annexed to Notice of Motion, February 14, 1962

[4947] (b) Any transaction or contemplated transaction between Toolco and TWA or between Toolco and any other air carrier or any acquisition or contemplated acquisition by Toolco of any stock, debentures, notes or other securities or evidences of indebtedness of TWA or of any other air carrier or any manufacturer or supplier of flight equipment including but not limited to the approval, requested approval, disapproval or other action by the Civil Aeronautics Board of any such transaction or contemplated transaction or of any such acquisition or contemplated acquisition;

(c) Any proposal for the merger of Northeast Airlines, Inc., with or into TWA or any other air carrier, including but not limited to the recommendations of any officers or directors of TWA or Toolco, or of any independent engineering or consulting firm with respect to such a merger;

(d) The employment of Mr. Charles Thomas (hereinafter Thomas) as president of TWA, the terms of said employment, demands or requests made by Thomas as to the terms of said employment or the resignation of Thomas as president of TWA, including but not limited to discussions, negotiations or conferences by or among Thomas or any other person associated with TWA and Toolco, any financial adviser to TWA, The Equitable Life Assurance Society of the

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United States (hereinafter Equitable), James F. Oates, Jr., Metropolitan Life Insurance Company (hereinafter Metropolitan), Harry C. Hagerty, or any other lending institution or representative thereof, or any of the [4948] additional defendants in the present action;

(e) Any loan by any bank, insurance company, or other lending institution to TWA or to Toolco or the purchase or other acquisition by any bank, insurance company or other lending institution of any securities or evidences of indebtedness of TWA or of Toolco, the terms thereof, any change or amendment of the terms thereof, or the repayment or refunding or collection of any indebtedness of TWA or Toolco;

(f) The creation of a voting trust with respect to the stock of TWA or of any other airline owned by Toolco, the terms of such a voting trust or the circumstances under which such a voting trust could be terminated;

(g) Agreements entered into by TWA and/or Toolco with the Boeing Airplane Company (now the Boeing Company and hereinafter "Boeing") and/or the General Dynamics Corporation (hereinafter General Dynamics), the negotiations of such agreements, the decision of TWA and/or Toolco to enter into such agreements, any agreement or proposed agreement with any lending institution for the financing of jet

Appendix F, Annexed to Affidavit of Bruce Bromley, February 15, 1963

Schedule Annexed to Affidavit of Bruce Bromley, Annexed to Notice of Motion, February 14, 1962

flight equipment to be purchased from Boeing and/or General Dynamics under said agreement or otherwise or any negotiations, conferences or discussions with respect to the foregoing;

(h) The employment of Charles C. Tillinghast, Jr. (hereinafter Tillinghast), as president of Trans World Airlines, Inc., the terms thereof, including but not limited to negotiations, discussions or conferences with respect to such employment or the terms [4949] thereof;

(i) Requests, if any, made by or to TWA that Toolco assign to TWA the rights to acquired aircraft ordered by Toolco from Boeing or from General Dynamics or the refusal of Toolco to comply with such requests;

(j) Changes made in the design of Model 880 aircraft ordered by Toolco from Convair or design modifications desired by TWA with respect to such aircraft, proposed changes in design or proposed design modifications in aircraft ordered by Toolco, or the making of acceptance or test flights with respect to such aircraft;

(k) The lease by Toolco to TWA of flight equipment or any condition, agreement or understanding in connection therewith or with respect to the purchase or lease by TWA of aircraft from any person other than Toolco or any discussions or negotiations with any of the additional defendants named herein;

Appendix F, Annexed to Affidavit of Bruce Bromley, February 15, 1963

Schedule Annexed to Affidavit of Bruce Bromley, Annexed to Notice of Motion, February 14, 1962

(l) The lease by Convair to Northeast Airlines, Inc. of six Convair Model 880 aircraft, the scheduling of deliveries of Convair Model 880 aircraft to TWA, Northeast Airlines, Inc. or Toolco, including but not limited to all communications or correspondence between or among Toolco, TWA, any person associated with TWA, Convair, Northeast Airlines, Inc. and any person associated with Northeast Airlines, Inc. with reference thereto;

(m) The ordering by Toolco from Convair of Convair Model 990 jet aircraft or any demand made by [4950] Toolco, that TWA acquire Convair Model 990 jet aircraft so ordered by Toolco;

(n) The offering by TWA to its stockholders of debentures in 1961, including but not limited to any conferences or communications with the Securities and Exchange Commission or any of its staff with respect thereto;

(o) Any meetings, discussions, correspondence, between either TWA, Ernest R. Breech (hereinafter Breech), Charles C. Tillinghast, Jr. (hereinafter Tillinghast), Irving Trust Company (hereinafter Irving), Metropolitan, Equitable and Dillon, Read & Co. (hereinafter Dillon, Read) regarding any plan, agreement, discussion, negotiations or other communications relating to any acts designed, or any attempts, to deprive Toolco of any rights which it had or may have under the various financing agreements executed in December 1960 and

particularly any attempts to prevent Toolco from regaining control of TWA, any acts designed, or any attempts, to perpetuate the Voting Trust entered into in December of 1960 or to interfere with the rights of Toolco to terminate said Voting Trust;

(p) Any negotiations, discussions, conferences or communications by or between Tillinghast and Breech and any representatives of Equitable, Metropolitan or Irving regarding steps to be taken to make it impossible for Toolco to terminate the Voting Trust and regain control of TWA;

(q) Any negotiations, discussions, conferences [4951] or communications regarding Toolco's alleged discovery of the proposed action between TWA and the lending institutions described in paragraph 53(c), (d) and (e) of Toolco's answer and counterclaims and the notification by Toolco of TWA, the voting trustees and the lending institutions as alleged in paragraph 53(d) and the alleged request for information by Toolco alleged in paragraph 53(d) and TWA's alleged refusal to furnish such information;

(r) The dependence of major airlines of the United States upon Equitable, Metropolitan and Prudential Life Insurance Company of America (hereinafter Prudential) for senior long term financing and the dominance by said insurance companies of such financing since 1955;

Appendix F, Annexed to Affidavit of Bruce Bromley, February 15, 1963

Schedule Annexed to Affidavit of Bruce Bromley, Annexed to Notice of Motion, February 14, 1962

(s) The recognition and enforcement of the "traditional lender concept";

(t) The extent of Metropolitan's financing of air carriers;

(u) The extent of Equitable's financing of air carriers;

(v) The extent to which Metropolitan and Equitable are engaged in a phase of aeronautics within the meaning of Section 408 of the Federal Aviation Act and the nature of the activities which produce or produced that result;

(w) The combination and conspiracy between the additional defendants named herein to prevent TWA from acquiring senior long term financing from others [4952] than Equitable and Metropolitan except with the consent and acquiescence of Equitable and Metropolitan;

(x) The combination and conspiracy to prevent TWA from acquiring senior short term financing from others than Irving and such banking institution as it permitted to participate in such financings;

(y) The agreement between the additional defendants named herein to refuse to supply financing to TWA or Toolco as long as TWA was controlled by Toolco;

Appendix F, Annexed to Affidavit of Bruce Bromley, February 15, 1963

Schedule Annexed to Affidavit of Bruce Bromley, Annexed to Notice of Motion, February 14, 1962

(z) The combination and conspiracy between the additional defendants named herein to prevent TWA from obtaining long term or short term financing except at interest rates determined in advance by agreement among the lending institutions;

(aa) The agreement between Equitable, Metropolitan and other lenders to the effect that none of such lenders would supply financing to any major airline without the consent of the traditional senior lenders to that airline and in the event that the traditional senior lenders to an airline refused to supply financing except upon particular terms, none of the other of such lenders would supply financing to that airline upon any terms;

(bb) The conspiracy between the additional defendants named herein entered into during 1960 to deprive Toolco of its voting rights with respect [4953] to TWA's stock owned by it and thus to deprive Toolco of control of TWA and the purpose of said conspiracy, namely to injure, maliciously and willfully, Toolco and Hughes.

II. All letters, memoranda, documents or other writings between or among Toolco, TWA, any person associated with TWA and any person associated with any of the following during the period from 1955 to date:

Appendix F, Annexed to Affidavit of Bruce Bromley, February 15, 1963

Schedule Annexed to Affidavit of Bruce Bromley, Annexed to Notice of Motion, February 14, 1962

(a) Irving;

(b) Equitable;

(c) Metropolitan;

(d) Merrill, Lynch, Pierce, Fenner & Smith, Inc.;

(e) Dillon, Read;

(f) Breech;

(g) Tillinghast;

which relate, directly or indirectly, to or refer to the management of TWA, the composition of its board of directors, the finances of TWA, the acquisition of any jet or other flight equipment by Toolco or TWA, the financing thereof, or the institution of this or other litigation by or against Toolco, Howard R. Hughes or any of the additional defendants named herein.

III. All letters, memoranda, documents or other writings constituting or relating to communications by or between any of the following (a) Irving S. Olds (hereinafter Olds), (b) Breech, (c) Raymond M. Holliday (hereinafter Holliday), (d) Toolco, (e) any person associated at any time with TWA or (f) any of the additional defendants named herein, which relate, directly or indirectly, to or refer to the management of TWA, including but not limited to the employment of [4954] Tillinghast as president of TWA or the composition of the Board of Directors

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Schedule Annexed to Affidavit of Bruce Bromley, Annexed to Notice of Motion, February 14, 1962

of TWA, the operations of TWA, the finances of TWA, the acquisition of jet flight equipment by Toolco or TWA, the financing thereof, the duties or responsibilities of Olds or Breech or Holliday as voting trustees, or the institution of this or other litigation by or against Toolco or Hughes.

IV. All letters, memoranda, documents or other writings constituting or relating to communications between or among Howard R. Hughes, any person associated with Howard R. Hughes, Toolco, TWA, any financial institutions and any governmental agency or body referring or relating, directly or indirectly, to the management of TWA, including but not limited to the employment of Tillinghast as president of TWA or the composition of the Board of Directors of TWA, the operations of TWA, the finances of TWA, the acquisition of jet flight equipment by Toolco or TWA, the financing thereof, the duties or responsibilities of Olds or Breech or Holliday as voting trustees, or the institution of this or other litigation by or against Toolco or Howard R. Hughes.

V. (a) Balance sheets and profit and loss statements of Hughes Tool Company for the years 1939 through 1960 inclusive and all financial statements, including profit and loss statements, relating to the first six months of 1961 or the results of operations during said period.

(b) All Federal income tax returns of Hughes Tool Company for the years 1939 to date.

Affidavit of William C. Chanler, February 15, 1963

[4955]

[CAPTION]

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

WILLIAM C. CHANLER, being duly sworn, deposes and says:

I am a member of the firm of Winthrop, Stimson, Putnam & Roberts, attorneys for additional defendants Irving Trust Company and Ben-Fleming Sessel in the above-entitled case. I make this affidavit in support of the motion of said additional defendants pursuant to Rules 37(b)(2), 37(d), 41(b) and 41(c) of the Federal Rules of Civil Procedure, for an order dismissing with prejudice the counterclaims asserted against them herein by defendant Hughes Tool Company (Toolco), on the ground of Toolco's willful failure [4956] and refusal to comply with orders of this Court pertaining to discovery proceedings herein. I also make this affidavit in support of an application for the immediate entry of a final judgment of dismissal of the counterclaims, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

I have read the affidavit of Bruce Bromley which is submitted in support of the motion of the additional defendants, and I adopt the statements therein contained with respect to the procedural history of Toolco's defiance of discovery orders of this Court. I would also note that my clients have also incurred huge expenditures in defense of this lawsuit from the time they were brought in as additional defendants in February of 1962.

Affidavit of William C. Chanler, February 15, 1963

It is appropriate for me to observe that a notice to take the deposition of Toolco by Howard R. Hughes, its Managing Agent, was served and filed on behalf of my clients on or about February 23, 1962. A copy of this notice is annexed hereto as Exhibit A and made a part hereof. A motion for the production of documents by Toolco pursuant to Rule 34 of the Federal Rules of Civil Procedure was served and filed on behalf of my clients on or about February 26, 1962, and was granted by the Special Master on March 6, 1962 (Tr. 2760). Finally, my clients joined in the motion for the production by Toolco of the "tax" documents pursuant to Rule 34 (see Tr. of January 17, 1963, p. 24).

Thus, it is clear that Toolco's failure to proceed with the deposition of Hughes, its failure and refusal to produce documents pursuant to Rule 34 which were held not to be protected by the attorney-client privilege, and its failure and refusal to produce the "tax" documents, were in [4957] violation of the right to discovery afforded to my clients by the orders of this Court. Toolco's wilful and deliberate default in making discovery to my clients fully warrants the dismissal with prejudice of the counterclaims asserted against them.

Toolco has attempted to justify these defaults by an alleged eleventh hour discovery (after over a year of expensive and burdensome litigation) that its counterclaims should have been referred to the CAB at the outset, and by its assertion that the expense of further litigation will exceed the amount of damages recoverable from Toolco by plaintiff. It is quite apparent from evidence now in the possession of the additional defendants that these contentions are frivolous and sham, and are advanced in a patent attempt to conceal the true reason why Toolco has refused

to proceed. That reason is that the documents and testimony which Toolco has refused to produce in accordance with this Court's orders would conclusively establish that the delays in obtaining financing and necessary flight equipment, which Toolco's counterclaims allege caused damage to TWA in an amount exceeding $45,000,000, were the direct result of a deliberate and carefully planned scheme by Toolco and Hughes to reap millions of dollars in profits and tax savings at the expense of TWA, and were not caused by the additional defendants as alleged in the counterclaims (See, e.g., opinion and order of Special [4958] Master dated January 22, 1963 attached as Appendix C to the affidavit of Bruce Bromley).

(Sworn to by William C. Chanler on February 15, 1963.)

Exhibit A, Annexed to Affidavit of William C. Chanler, February 15, 1963

Irving's and Sessel's Notice of Taking Deposition of Toolco by Hughes and Holliday, dated February 23, 1962

[4959]

[CAPTION]

SIRS:

PLEASE TAKE NOTICE that, pursuant to the Federal Rules of Civil Procedure, additional defendants Irving Trust Company and Ben-Fleming Sessel demand that defendant Hughes Tool Company by Howard R. Hughes, its Managing Agent, who, on information and belief resides in the State of California, and Raymond M. Holliday, its Vice President, who, on information and belief resides in the State of Texas, appear on February 28, 1962 at 10 o'clock in the forenoon at Room 601, United States Courthouse, Foley Square, New York, New York, at which time and place additional defendants Irving Trust [4960] Company and Ben-Fleming Sessel will take their depositions upon oral examination before an officer duly authorized by law to take depositions. The examination will continue from day to day until completed. You are invited to attend and cross-examine.

Dated: New York, New York
February 23, 1962

Yours, etc.,

WINTHROP, STIMSON, PUTNAM & ROBERTS
Attorneys for Additional Defendants
Irving Trust Company and Ben-Fleming Sessel
40 Wall Street
New York 5, N. Y.

By PETER H. KAMINER
A Member

Affidavit of Charles L. Stewart, February 15, 1963

[4961]

[CAPTION]

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

CHARLES L. STEWART, being duly sworn, deposes and says:

I am an attorney and a member of the firm of Dunnington, Bartholow & Miller, attorneys for the additional defendant Dillon, Read & Co. Inc. ("Dillon Read"). This affidavit is submitted in support of the motion of the additional defendants pursuant to Rules 37(b)(2), 37(d), 41(b) and 41(c) of the Federal Rules of Civil Procedure for an order dismissing the counterclaims herein with prejudice by reason of Hughes Tool Company's ("Toolco") repeated deliberate refusals to make discovery in accordance with the Federal Rules of Civil Procedure, the rulings of the Special Master, and the orders of this Court. This affidavit is [4962] also submitted in support of the motion of the additional defendants for an order directing the entry of a final judgment dismissing the counterclaims with prejudice and for an express determination that there is no just reason for delay, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

I have read the affidavit of Bruce Bromley attached to this motion and I adopt the recital of facts set forth in that affidavit as to the repeated and deliberate refusals of Toolco to make discovery to the additional defendants in this lawsuit.

Affidavit of Charles L. Stewart, February 15, 1963

For the reasons set forth in the affidavit of Bruce Bromley, Dillon Read is entitled to the relief sought in this motion. It moved, together with the other additional defendants for the production of the allegedly "privileged" documents and the so-called "tax" documents. The terms of the orders compelled the production of these documents to Dillon Read. Similarly, Dillon Read noticed the deposition of Toolco by its managing agent (Hughes) for March 7, 1962, by Notice of Deposition dated February 22, 1962, a copy of which is attached hereto as Exhibit A. The provisions of the subsequent rulings of the Special Master and orders of this Court gave Dillon Read the right, as an additional defendant, to take the deposition of Hughes by oral examination. Toolco's willful and deliberately calculated refusal to make discovery to Dillon Read more than justifies the dismissal of the counterclaims as to it with prejudice.

Toolco added Dillon Read as a party to this litigation, in spite of the fact that Toolco knew full well that Dillon Read, even if it wished to, could not possibly give the relief Toolco claimed it was seeking. Dillon Read [4963] is not a party to the Voting Trust Agreement, has never loaned money to TWA and owns no stock in TWA. It is not a "lending institution" in any sense. Nonetheless, Dillon Read was compelled to participate in the hearings and Toolco's depositions which were held almost daily before the Special Master during the past year. Further, it was ordered to produce thousands of documents in response to Toolco's Rule 34 motion within days after having been joined as an additional defendant.

Dillon Read has been compelled to spend staggering sums in its defense in this intensive and complex litigation, only to find when given an opportunity by the Court to

obtain the evidence needed to demonstrate the completely baseless nature of the charges against it, that Toolco flatly refused to make any further discovery in defiance of Court orders. The sorry spectacle of Toolco's conduct in this case is more than ample grounds for this Court to exercise the widest possible discretion in awarding costs to Dillon Read. Even when it does so, Dillon Read can only recover a small fraction of its expenses in this wasteful litigation.

I am aware that TWA also seeks judgment on its complaint against Toolco, likewise based upon Toolco's noncompliance with the Court's orders. In its complaint, TWA seeks money damages, divestiture of Toolco's stock in TWA and injunctive relief. I am in no position to judge how long a time period may necessarily elapse before TWA's relief against Toolco can be completely adjudicated. However, the issues raised by the counterclaims, although factually related to the transactions set forth in the complaint, are entirely separate and distinct. Thus there is no reason for any delay in entering a final judgment dismissing the counterclaims against Dillon Read with prejudice.

[4964] WHEREFORE, it is submitted that this Court should make an express determination that there is no just reason for delay and should expressly direct the entry of judgment dismissing the counterclaims as to Dillon Read with prejudice.

(Sworn to by Charles L. Stewart on February 15, 1963.)

Exhibit A, Annexed to Affidavit of Charles L. Stewart, February 15, 1963

Dillon, Read's Notice of Taking Deposition of Toolco, dated February 22, 1962

[4965]

[CAPTION]

SIRS:

PLEASE TAKE NOTICE that Dillon, Read & Co. Inc., an additional defendant on counterclaims, will take the deposition of defendant Hughes Tool Company, by its officers: Raymond Holliday, Vice President; M. E. Montrose, Vice President; C. H. Price, Vice President; C. S. Johnson, Vice President; H. E. Rogers, Vice President; C. Collier, Assistant Treasurer and Assistant Secretary, and such other officers, employees and managing agents who may have knowledge pertinent to the issues raised in the counterclaims herein, at Room 601 of the Federal Courthouse, Foley Square, New York, New York, at 10:00 A. M. on the 7th day of March, 1962 upon oral examination pursuant to the Federal Rules of Civil Procedure before a Notary Public in and for the County of [4966] New York. The oral examinations will continue from day to day until completed. You are invited to attend and cross-examine.

Dated: New York, New York.
February 22, 1962.

DUNNINGTON, BARTHOLOW & MILLER

By /s/ CHARLES L. STEWART
Charles L. Stewart
A Member of the Firm
Attorneys for Dillon, Read & Co., Inc.
Additional Defendant on Counterclaims
Office and P. O. Address
161 East 42nd Street
New York 17, New York

Affidavit of Carl S. Rowe, February 15, 1963

[4967]

[CAPTION]

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

CARL S. ROWE, being duly sworn, says:

1. I am a member of the firm of Chadbourne, Parke, Whiteside & Wolff, attorneys for additional defendant Charles C. Tillinghast, Jr. and I am familiar with the pleadings and proceedings had herein.

2. I submit this affidavit in support of the motion of this additional defendant for an order, on the grounds set forth herein and in the affidavit of Bruce Bromley, sworn to February 15th, 1963, directing the entry of final judgment dismissing the First, Third, Fourth and Fifth counterclaims herein, with prejudice, as to this additional defendant and expressly determining that there is no just reason for delay in the entry of such a final judgment.

[4968] 3. Since the commencement of this action against the additional defendants more than a year ago, my firm has been required to represent Mr. Tillinghast in connection with the detailed and extensive pre-trial discovery conducted by the Hughes Tool Company ("Toolco") and in connection with numerous motions and appeals, and has been further required to devote considerable time and effort to the preparation of his defense.

Affidavit of Carl S. Rowe, February 15, 1963

4. In the present posture of this action and in view of the burden and expense which has thus been imposed on Mr. Tillinghast and the other additional defendants, there is no excuse for the refusal of Toolco to comply with the orders of this court granting the discovery to which each of the additional defendants is entitled.

WHEREFORE, it is respectfully submitted that the First, Third, Fourth and Fifth counterclaims should be dismissed, with prejudice, as against this additional defendant and that there is no just reason for delay in the entry of such a final judgment.

(Sworn to by Carl S. Rowe on February 15, 1963.)

Pretrial Hearing, October 29, 1962

[24648]

[CAPTION]

BEFORE:

HON. CHARLES M. METZNER,
District Judge.

[APPEARANCES:]

* * *

[24659] The Court: Judge Bromley, you are alive and interested. Would you like to talk now?

Mr. Bromley: May it please the Court, I endorse Mr. Sonnett's position and everything that he said.

It seems to me that it has now become apparent that Mr. Davis has been able at every critical point to insert into the consciousness of the special master some new tactic well designed to postpone Mr. Hughes' appearance as long as may be, [24660] and the sudden injection of Mr. Breach as the man to be examined before we get to Mr. Hughes is an illustration of that tactic.

There really is no reason to have Mr. Breach examined before Mr. Hughes. As Mr. Sonnett has said, his prime concern is in the area of the counterclaims, not in the complaint.

And, secondly, even the February 11th date on the record is not a firm date because the master made it perfectly clear that he was free to postpone it at the last minute again, or prior thereto, should developments, in his mind, warrant it.

Now all Mr. Davis has to do is to extend Mr. Breach's examination and then argue that, after all, the interro-

gatories are answered and the February date becomes March or April or May, and all the time the company is suffering, and we, Metropolitan and Equitable, as its principal creditors, are likewise suffering.

And the whole controversy really could be measurably advanced should we have the opportunity promptly to examine Mr. Hughes.

I think the master should be reversed in that respect and that your Honor should rule that upon [24661] the conclusion of Leslie—because Mr. Kocke, it is apparent, knows nothing about anything—we should proceed to California, holidays or no holidays.

The Court: Mr. Stewart.

Mr. Stewart: Very briefly, your Honor, I would like to speak about the date for Hughes' examination.

We have already submitted an affidavit outlining our position and I don't see any point in repeating what is contained there.

I don't see any reason for your Honor to put over this examination of Mr. Hughes to February 11th. But even more, I endorse what Judge Bromley says in the sense that whatever date is set should be a firm date.

We have all seen how the Tool Company can come up to what is supposedly a firm date and nothing happens. We actually have a logistical problem, your Honor, in going out to Los Angeles to take Mr. Hughes' examination. I would very much hate to see a situation where we plan for this, prepare for this, get out to Los Angeles, and on February 11th there is no Mr. Hughes.

So that I would ask that whatever date is [24662] set, your Honor, be a firm one.

* * *

Pretrial Hearing, January 9, 1963

[24686]

[CAPTION]

BEFORE:

HON. CHARLES M. METZNER,
District Judge.

[24688] [APPEARANCES:]

* * *

[24689] The Court: The Court has a number of matters pending. The Court has indicated to counsel that it desired argument on several of them this afternoon. But for the record there is an appeal pending by TWA pursuant to a telephonic request to review an order of the Special Master adjourning the deposition of Howard R. Hughes to February 11, 1963. Yesterday counsel for TWA filed an application to withdraw this appeal based upon the transcript of the hearings before the Special Master on October 25, 1962, and October 28, 1962.

Second, we have an appeal by Hughes Tool Company dated January 3, 1963, seeking to review an order of the Special Master denying Toolco's application to examine Ben-Fleming Sessel and the Irving Trust Company by Sessel and Arthur L. Wadsworth and Dillon, Read & Company by Arthur L. Wadsworth upon the completion of the deposition of A. V. Leslie or in conjunction with his staggered deposition.

Thirdly, we have a motion by Hughes Tool Company pursuant to Rule 16 of the Federal Rules of Civil Procedure, authorizing and directing the Special Master to conduct pre-trial conferences, with recommendations for the form

and terms of a pre-trial order defining and limiting the legal and factual issues [24690] in this case.

Fourthly, we have an appeal by Hughes Tool Company dated September 19, 1962, from an order of the Special Master directing the Tool Company to produce for inspection and copying by opposing counsel the documents with respect to which Hughes Tool Company claims attorney-client privilege.

Fifth, we have an appeal by TWA pursuant to a telephonic request to review an order of the Special Master denying its motion to quash or strike interrogatories served by Toolco on October 11, 1962.

And, finally, we have an appeal dated December 20, 1962, by TWA from an order of the Special Master overruling TWA's objections to the further interrogatories dated November 13, 1962.

Obviously, there is no need to hear argument on item number 1 regarding the adjournment of the deposition of Howard R. Hughes to February 11, 1963, since TWA has withdrawn that application.

There is no need to have further argument on the application by Hughes Tool Company for an order directing the Special Master to have pre-trial conference hearings pursuant to Rule 16 of the Federal Rules of Civil Procedure.

[24691] There is no need to have argument on the appeal by TWA to review an order of the Special Master to quash or strike the interrogatories served by Toolco, since that was argued on October 29, 1962, and the final papers were submitted on November 7th.

I see no necessity for argument, unless counsel wishes it, for the appeal by TWA from an order of the Special Master overruling TWA's objections to the further interrogatories, since I assume the same principles will be argued

on that item as have been argued on the original motion to strike.

Mr. Sonnett: We would rest, your Honor, on the prior record, plus the short brief served this morning.

The Court: I received that this morning.

Mr. Sonnett: Yes, your Honor.

The Court: I suggest then, Mr. Davis, that you start off on your application to review the order of the Special Master denying your application to proceed with the depositions of Sessel and Wadsworth.

Mr. Davis: Your Honor, preliminarily I would like to make some corrections on the papers which we submitted in connection with that application. Referring first to my affidavit——

[24692] The Court: Just a second. I have gone through all these in the last four days. Now I will have to go find it.

Mr. Davis: This is the last paper I filed, your Honor.

The Court: Your affidavit or Mr. Cook's affidavit?

Mr. Davis: That is correct, looking at my affidavit first, your Honor, you will note that following page 16 at the end of the affidavit there is annexed as Exhibit A excerpts from the testimony of Mr. Cocke. Yesterday Mr. Cocke made some corrections of a typographical nature which do change the sense of what he was saying, and I would like at this point to make two small corrections.

The Court: Where do they appear?

Mr. Davis: First at page 55 of Exhibit A, your Honor.

The Court: Yes, I have it.

Mr. Davis: Page 55, you see in the answer of Mr. Cocke where he said, "I said, and I repeat that I expressed the opinion that Mr. Hughes, to use my own words, was afraid of a deposition."

The Court: Yes?

Mr. Davis: He wants to insert the word "not." [24693] He wants to express the view that Mr. Hughes was not afraid.

The Court: Was not afraid.

Mr. Davis: That is what he testified to yesterday. And then at page 65, in the next to the last full paragraph, the line beginning:

> "I don't recall who made the decision that it should be deferred because it wasn't on the agenda."

He wants to insert the word "not" between "should" and "be." So it reads:

> "I don't recall who made the decision that it should not be deferred because it wasn't on the agenda."

The Court: All right.

Mr. Davis: One more matter, your Honor, in connection with the affidavit of Mr. Cook, Mr. Cook annexes as part of his affidavit a letter from Mr. Sessel to a Mr.— I will give you the exhibit number— I think it is Exhibit A of the affidavit. It is a letter of April 16, 1958, by Mr. Sessel to Mr. Engelman.

The Court: I have it.

Mr. Davis: That, your Honor, is a copy, or, rather, is a transcription by one of our reporters of the document found in the Irving Trust Company files. [24694] At that time we didn't have available to us a photostatic copy of the document itself as found in the files of the Irving Trust. That, however, was made available to us yesterday afternoon. I would like to hand to the Court at this time a photostatic copy of the document that we did find in the files of the Irving Trust. To my knowledge there

is no difference between the document itself and this copy, but I would prefer that for the record.

The Court: Have you given a copy to the other side?

Mr. Davis: All of them have a copy, because the document was produced during yesterday's deposition and all counsel were there and obtained in due course a copy of everything that was produced. I have extra copies here if anyone wishes one.

Mr. Sonnett: There is no correction in the date of the letter; it is still written in 1958.

Mr. Davis: Yes.

The Court: You may proceed, Mr. Davis.

Mr. Davis: Now, your Honor, there is one other matter which I would like to call to your Honor's attention and have the record reflect. The question was raised before the Special Master by Mr. Barr, and I am [24695] calling it to your Honor's attention, and that is that a substantial portion of what appears in my affidavit and Mr. Cook's affidavit was not before the Special Master at the time he made his ruling which is now under review. In other words, the testimony of Mr. Cocke subsequent to December 18, 1962, and which we have in our exhibit as an excerpt beginning at page 13, namely, the excerpts from Mr. Cocke's deposition beginning at page 13 of Exhibit A, and that is following January 3, 1963, wasn't before the Special Master at the time of his ruling. Exhibit B to my affidavit, however, was at one time an exhibit to a brief which was filed with this court and a copy of which had been furnished to the Special Master, and, therefore, in one sense it may be deemed that he would have been aware of the existence of that letter, even though it was not specifically referred to at the time he considered and decided the application which we made for the taking of the deposition of Mr. Sessel.

Now, going to the affidavit of Mr. Cook, the letter of April 16, 1958, which I just handed to your Honor, a copy of which is marked Exhibit A to Mr. Cook's affidavit, that was not before the Special Master at the time of his ruling.

[24696] Exhibit B, being a memorandum found in the files of the Equitable signed by Mr. Oates, was not before the Special Master. Nor was Exhibit C, which is a memorandum from the files of Equitable by Mr. Keehn, dated December 29, 1960.

Now, the next document, Exhibit D, being the notes of a telephone conversation between Mr. Sessel and Mr. Gordon, of the Bank of America, was an exhibit which had been used during the course of the depositions. Mr. Cocke had not testified with respect to that exhibit as he did on January 3rd and following. But that document was one which was part of the record and, therefore, it may be assumed that the Special Master was aware of its existence.

Exhibit E of Mr. Cook's affidavit, which is a memorandum of Mr. Keehn dated July 7, 1965, furnished to us by Equitable Life, was not before the Special Master at the time of his ruling. He became aware of it subsequently.

Exhibit F, which are the notes of a telephone conversation or notes of Carver relating to a telephone conversation between Mr. Gordon and Mr. Sessel, was marked as Defendants' Exhibit 117 and was a document which was made part of the record at the time of the [24697] Special Master's ruling, but, of course, Mr. Cocke's testimony, which, to some extent, relates to the same subject matter was not before the Special Master.

Now, if your Honor please, I do not want to take the time of the Court or burden the Court by repeating to the Court what I know has been previously and adequately presented to the Court and unquestionably considered by

the Court. There are relatively few things which I feel desirable to point out to the attention of the Court if I assume that your Honor has had an opportunity since yesterday to review my affidavit and that of Mr. Cook.

I appreciate the fact that I was late in filing that affidavit. Mrs. Lea and I stayed up to 4 o'clock in the morning to get enough time, but, mechanically, I got a little fouled up and I could not get it filed any sooner than I did. If I may assume that your Honor has had an opportunity to review the material which is presented in these two affidavits, I can limit my remarks very briefly.

The Court: I have read them.

Mr. Davis: First, I would like, then, to emphasize a matter as to which I am sure my opponents will advert to, and that is the length of time which the [24698] Tool Company has been on depositions, and even the reference of the Special Master that on February 11th it will be approximately a year that he has been sitting as a Special Master. In fact, the Tool Company has had 80 witness days during that period of time, 80 days during which we examined a witness. During that time I have had a computation made by my office, and I am informed that only 80 per cent of the pages of transcript taken during those 80 days are in Q and A form. The rest has been spent in colloquy or points being raised by one of the various counsel. On each day of these depositions there have been a number of counsel present, and each, of course, has been afforded full opportunity to either make objections, comment on the objections, or make remarks. So that based upon the number of pages of the transcript taken during those 80 witness days I find that only approximately 66 per cent of those transcript pages are devoted to Q and A. That would reduce, in effect, the taking of questions and answers from witnesses to 53 days.

The further fact that I would like to call to your attention is what has transpired since October 25, 1962, which is the date, if your Honor will recall, when the Special Master ruled with respect to the objections [24699] of TWA to answering these further interrogatories.

The Court: You mean the first interrogatories on October 25th?

Mr. Davis: That is correct, and at the same time it is the time when he ruled upon the application as to the further adjournment of the return date and taking of the deposition of Mr. Hughes, where the Special Master in fixing the advance date of February 11th made certain comments as to what he assumed could take place during that period of time.

Subsequent to that date the Tool Company has had 25 witness days, and based upon the pages of transcript during those 25 witness days we find that approximately 82 per cent of those pages were devoted to Q and A.

I mention that, your Honor, only for the purpose of putting into proper focus what it is that the Tool Company has been doing.

The Court: What is the status of the depositions of Cocke and Leslie?

Mr. Davis: I stopped at the deposition of Mr. Cocke when I said that, "I have no further questions of him at this time." The Special Master felt that it would be desirable to give Mr. Cocke an opportunity [24700] to refresh his recollection and testify further. As to the manner in which it was to be done, the Special Master suggested that his remarks should be kept confidential and under seal, and if your Honor would like to have more information with respect to that——

The Court: Have you now finished with Mr. Cocke?

Mr. Davis: No, I have not. I have been requested—maybe I should say it has been suggested, if not requested by the Special Master to review once more with Mr. Cocke his testimony covering the years 1959, 1960 and 1961 so as to give Mr. Cocke an opportunity to further expand and elaborate on his prior testimony.

The Court: Wasn't he supposed to do that on January 3rd?

Mr. Davis: It started on January 3rd, your Honor, and it has not been completed. First of all, a number of things happened during the course of Mr. Cocke's testimony with respect to the production or lack of production of documents. There is a good deal involved. A good deal of time was taken up in that connection. And, as I say, I have submitted to you excerpts from Mr. Cocke's testimony subsequent to January 3rd. Yesterday I would say that he testified approximately an hour and a [24701] half. The rest of the day was spent in trying to untangle this production of documents question which has arisen, what has been produced and what has not been produced.

The Court: How about Mr. Leslie?

Mr. Davis: Mr. Leslie testified to the financing which took place in the year 1958. Then he asked that he be excused from further testimony because of his commitments and obligations to Douglas, the year end financial statements coming up, and his return date has been adjourned for one reason or another, and as of the moment he is scheduled to return on January 21st.

The Court: Isn't it the 14th?

Mr. Davis: It was the 14th.

The Court: The transcripts I read before the Special Master said January 14th.

Mr. Davis: You are quite correct. However, either yesterday or the day before the Special Master informed us that he is scheduled for argument before the Supreme Court of the United States, which is scheduled for that week. And so yesterday we all received a letter which was confirmed that we would resume our depositions on January 21st with Mr. Leslie.

[24701] The situation with respect to Mr. Leslie is Mr. Leslie has asked that he be required to come to New York only when there could be a full week devoted to him. The matter is left in abeyance as to what the ruling of the Special Master may or may not be as to the availability of Mr. Leslie for that one week which is presently scheduled.

The Court: How much time do you have with Mr. Leslie?

Mr. Davis: Your Honor, it depends almost entirely as to whether or not I may assume that a decision will be made with respect to the appeal which TWA has taken as to interrogatories. There is nothing which transpired subsequent to 1958 other than the 1960 financing which is the heart of this controversy as referred to by Mr. Cocke. Whether I shall take the time to go through the details, and it would be a very detailed examination, because there were extended negotiations with a great many complications taking place during 1958 and 1960. However, from the point of view of the antitrust law, which is all I am addressing myself to or trying to address myself to, there is very little that I can really hope to obtain from Mr. Leslie, other than putting him through basically the [24702] same area that Mr. Cocke testified about in what appears as Exhibit A, because, as your Honor knows, for some time, in fact, I believe, from the first day that I appeared before your

Honor, I indicated that it was my plan and expectation to bring on an appropriate motion to dismiss as soon as we were in a position to do so.

The Court: You have made six references to that before the Court, starting September 1, 1961.

Mr. Davis: I am surprised it is as few times as that, your Honor, and I am sure it is a burden to have me repeat my position so many times. But it is basic to the issue which I think is confronting us, and, basically, the position of the Tool Company is if it is to have or is entitled to any right to discover what a complaint is about, we have not had it yet, because we still do not know.

It now appears from the examination of Mr. Cocke's testimony, and something which I think was to be suspected before I examined Mr. Cocke, but I could not make the assertion, and that is there is no one at TWA, unless it is Mr. Sessel, and I doubt Mr. Sessel knows any facts which justify violation of the antitrust law. Certainly, his letter just handed to you suggests just [24703] the opposite. I don't think there is anyone at TWA knows any fact supporting that.

In that respect, counsel have asserted the work product privilege, which they have a right to assert. The only thing I know of as to how a defendant may find out, if he is entitled to find out, if you assume he is entitled to find out, the only way in these circumstances a defendant is going to be able to find out what this complaint is about or what the course of conduct of either Hughes or the Tool Company of which TWA is complaining about, may be by means of interrogatories or a Rule 16 proceeding, which will require TWA corporate-wise to answer at least questions based upon whatever knowledge that has been accumulated through its various agents or agencies.

[24704] On this advice question, your Honor may know or may not know that in the course of the depositions of Mr. Tillinghast that the attorney-client privilege, not the work-product privilege, between the Cahill firm and TWA was waived in the presence of a third party, namely, counsel for the voting trustees. There was a detailed discussion of the complaint, the ' .l theories involved, and presumably whether the facts justify or do not justify whatever the complaint is about. There was also furnished the minutes of the executive committee meeting of June 29, which the Special Master has also ruled to be an independent and separate waiver of the attorney-client privilege. So we are not handicapped by the attorney-client privilege insofar as I can now examine any witnesses who had any conversations with counsel with respect to the subject matter of the complaint, although we are at odds, that is, the Cahill firm and I are at odds as to the scope or extent of that waiver, and the Special Master has ruled so far that the waiver has taken place, and the extent of the waiver is yet to be determined as we proceed.

However, the Cahill firm has still asserted the work-product privilege, whatever memos they have [24705] prepared. Apparently, the only person who has given them any memo of any facts is Mr. Rummel. That would seem to be the conclusion from Mr. Cocke's testimony, and certainly based upon the record, the excerpts of which I have not added to Exhibit A. It would seem that the only writing in existence which identifies or describes whatever transactions are involved are the so-called Rummel notes with respect to it. With respect to the financing, there are some handwritten notes of Mr. Leslie and there are other notes of Mr. Thomas, all of which have been produced.

Before I leave this question of interrogatories, your Honor, I understand that counsel for TWA's main objec-

tion from a legal point of view to answering these interrogatories is the assertion that interrogatories may not be served while a party is engaged in oral discovery.

The Court: I think that is in the sole discretion of the Court whether or not they shall be served.

Mr. Davis: That may be the proper answer, your Honor. What I would like to say at this point, your Honor, is I am perfectly willing as I indicated [24706] in my argument before the Special Master, and I want to say it here also, to suspend oral discovery for the purpose of obtaining answers to my interrogatories.

The Court: What else do you have to say about Mr. Sessel?

Mr. Davis: With respect to Mr. Sessel, I think there can be no question from the facts which I have assembled and tried to present to you in these two affidavits that if there is a single person who does have knowledge of what, in fact, took place during the period 1955 through 1960, which counsel for TWA has asserted on a number of occasions is the period of the acquisition and financing of the jet aircraft, the period which involved the so-called negotiations for the Northeast merger, if there is a single person who knows those facts from all sides and angles, it would be first Mr. Sessel, of the Irving Trust, who during that period was not only the leading banker for TWA, but also the principal banker for Mr. Hughes and the Hughes Tool Company, who was a director of TWA, who participated in all negotiations and decisions that took place during that period. And, secondly, if there is any other person who compares to Mr. Sessel, it would be Mr. Wadsworth, of Dillon, Read. [24707] Dillon, Read, who were the principal architects of the so-called Dillon, Read plan, which was on

and off, and finally was consummated in 1960. And if we are to be required to continue the taking of oral depositions for whatever period of time the Court determines is the right which we have or to comply with whatever right the Court previously determines we have, I submit that we ought not be handicapped or restrained as to who we take on next.

In this respect I would submit to your Honor a decision by Judge Weinfeld in Haynes v. Columbia Pictures Corp., 16 F. R. D. 118, 124 (S.D. N. Y. 1954), quoting from what appears in that opinion. As I understand, the facts in that case, your Honor, involved a question as to whether diversity of citizenship existed, and the plaintiff was examining the defendants, some of whom were residents of California and some residents of New York. Apparently controversy arose as to which he ought to examine first, and the Court had occasion to say:

> "... There remains the defendants' final request that the examination of the California residents be deferred until the conclusion of the [24708] depositions of the New York residents.
>
> "Absent unusual or compelling circumstances, an examining party should be permitted to examine witnesses or parties in the order he deems best calculated to disclose evidence or leads pertinent to the subject matter of his claim or defense. No sufficient ground has been presented for interfering with the control which the plaintiff here as the examining party would normally exercise in the order of the examination."

The Special Master's ruling, however, seems to have been predicated upon, first, the fact that in connection with the implementation of the first decision by Judge Herlands with respect to priority the Court annexed a schedule to its order. That schedule consists of nothing more than a notice of the taking of the deposition served by the defendants immediately following the filing of the complaint. I believe I have said more than once that in serving those notices for the taking of deposition there was no intent on the part of the Tool Company or its counsel to follow any particular scheme, nor had it any idea as to what would be the best way in which [24709] to determine whatever evidence was to be developed. Mr. Sessel and Mr. Wadsworth are on that list to which priority was established, and the only question which is to be raised in that connection is that their names do not appear immediately following that of TWA.

The Special Master also seemed to be concerned with the fact that he had determined that Mr. Hughes' deposition was scheduled to take place on February 11, and it may be inferred that he felt by the time that Mr. Leslie was concluded and Mr. Cocke was concluded, then the time lapses which were bound to occur, that nothing worthwhile might be accomplished prior to February 11th, and, therefore, in that sense no particular harm to Toolco, if you assume that Toolco's depositions or discovery is to be interrupted, and is to be interrupted before this Court has satisfied itself that it has jurisdiction over the subject matter of this action.

[24710] I respectfully submit, your Honor, that the facts presented to the Court by these affidavits and by the testimony of Mr. Cocke, and if your Honor has had an opportunity to review even hastily the testimony of Mr.

Rummel, I submit that the conclusion is inevitable that there is at least a very, very serious question as to whether or not the claim that TWA is asserting is properly a claim under the antitrust laws. I respectfully submit to your Honor that we are confronted with the necessity of satisfying ourselves as to the basis for the jurisdiction of this court before a plaintiff may subject a defendant to what TWA is seeking to do with respect to the deposition of Mr. Hughes, quite apart from the admissions of TWA with respect to the testimony of Mr. Cocke, which I have annexed as an exhibit to my affidavit, portions of which I would like to particularly call to your Honor's attention.

Now, I say, your Honor, that even if we were to assume that the CAB did not exist or that if exemption from the application of the antitrust laws did not exist, I am talking now simply as to whether or not there is a course of conduct by the Tool Company which is related in any way to the violation of the antitrust laws.

[24711] The Court: Mr. Davis, we have gone through this several times. You are arguing a motion for a summary judgment.

Mr. Davis: No. I say I want to be in a position to do that.

The Court: But you will never get to that point until you go through the proper procedures. I am not of a mind to overrule the decision of the Court of Appeals.

Mr. Davis: I would like opportunity to address myself to that question at the appropriate time if I get answers to my interrogatories which I am entitled to. We have the position of the plaintiff at that point.

The Court: You have not afforded the plaintiff an opportunity to examine and cross-examine the defendant,

and In Arnstein v. Porter, Colby v. Klune, and in the Bozant case and other cases the Court of Appeals said unless you have had an opportunity of discovery of the opposing party and examination and cross-examination the Court should not grant a motion for a summary judgment.

Mr. Davis: If that is the thing that is underlying the question, I would like an opportunity to brief the question to your Honor.

[24712] The Court: I don't think you have to, because I have looked into that question on several occasions and I have done extensive research upon it and I have written upon it.

Mr. Davis: If the complaint states a cause of action——

The Court: You want to go beyond the complaint and produce the evidence that you have adduced at a deposition proceeding. You, therefore, turn your motion into a motion for summary judgment and the rule states you can do that.

Mr. Davis: Your Honor, in that connection your Honor is overlooking the provisions of the Federal Communications Act. This complaint did not say anything about a course of conduct in violation of the CAB. The admissions of the plaintiff are just as much a part of this complaint as the complaint itself.

The Court: No doubt about that.

Mr. Davis: I am talking about the testimony of TWA.

The Court: All right. Let us go on to something else, then, Mr. Davis. We have been through this several times and I have ruled on it back in March.

Mr. Davis: I recognize that you have, but a [24713] defendant is reasonably entitled to find out the course of conduct that is in the case, and I respectfully submit that I have not had that opportunity. The only thing I have

discovered in these 80 witness days is that counsel for TWA knows what they are doing, but nobody else does.

The Court: Do you have anything else to say about Sessel-Wadsworth?

Mr. Davis: I believe that your Honor is sufficiently familiar with the circumstances which relate to this date of February 11th and how it occurred without my retracing the procedural steps that took place. That developed merely because we elected to accept the service for the subpoena of Mr. Hughes, rather than answer interrogatories, because up to this point there has never been any order of this court or finding either by the Special Master or this court that the circumstances developed justify or support the need of the plaintiff at this time to take the deposition of Mr. Hughes. There is no such finding or order of any kind. All that has happened is that rather than answer interrogatories as to Mr. Hughes' whereabouts I undertook to accept service of a subpoena in connection with the noticing of the taking of the deposition. That notice of subpoena [24714] had an arbitrary date, the same as mine had when I started to file my notices and that date has been adjourned on a couple of occasions. There has been no finding whatever of any kind by the Special Master, no finding of fact or circumstance which has developed since October 25th or any other time indicating any need at this time for the plaintiff for the protection of any rights of the plaintiff to take the deposition of Mr. Hughes or anyone else in the Hughes Tool Company.

Now, as I have indicated before, your Honor, and whether or not I succeed or do not succeed, I respectfully submit I am entitled to this and I am prepared to suspend all oral depositions if answers to these interrogatories are

given which will be binding upon TWA and which will establish whether or not this court has jurisdiction over the subject matter of this action, and I respectfully submit that once we have answers to these interrogatories, this court, as well as defendants' counsel will know what it is we are defending ourselves against, and I ask that an appropriate decision be made as to the order of taking depositions and like related matters.

Your Honor, I would like a few minutes, unless your Honor tells me you are sufficiently familiar with the [24715] testimony of Mr. Cocke, to point out the circumstances which cast great doubts as to the true underlying reasons for having selected the course of action of filing of the antitrust complaint, which is the sole foundation for the Court exercising any of its powers. If your Honor has adequately reviewed these excerpts of Mr. Cocke's testimony, I will not burden your Honor. On the other hand, if your Honor has not had an opportunity to do so, I would like to address your Honor's attention to a few portions.

The Court: You have indicated that at the beginning of your argument and I have read your papers.

Mr. Davis: I have nothing that I think is necessary for me to add, then.

The Court: Counsel for Irving Trust Company, Mr. Chanler. I assume you are also talking for Mr. Sessel.

Mr. Chanler: Yes. The Irving Trust Company and Mr. Sessel.

[24716] As your Honor is aware, I want to remind your Honor that on February 7, 1962, you stated that the schedule of examination may be varied by the Special Master if in his opinion the circumstances require certain variances. Then again on March 5 after the counterclaim was

filed you stated that the examinations of Toolco should be limited to the complaint and they could not examine as to the counterclaims and that since the Special Master is presiding over the depositions on a day-to-day basis, he will see to the application of this limitation.

Now, in September the question of the examination of Hughes came up, and your Honor at that time set the examination of Mr. Hughes to October 29, giving Toolco the right to file an application for further adjournments, stating the propriety of such application is peculiarly within the Special Master's competence.

Mr. Rankin, thereupon, adjourned the deposition to February 11, 1963, stating he did so in order to give everybody, particularly Toolco, ample time to complete the examination of what witnesses it then had, Tillinghast, Leslie, Cocke and Rummel, and the presentation of whatever motions Toolco cared to make to the Court with respect to various legal contentions which it had previously [24717] raised, there having been made more than six times a motion to dismiss.

Now, he made it quite plain that he intended the examination to be held, and no appeal was taken from that order of the Special Master. So that order, it seems to me, is now the law of the case setting down the Hughes deposition for February 11.

On December 4 Mr. Davis filed an application for examination of the Irving Trust by Sessel, and Dilion, Read by Wadsworth, and Wadsworth individually. That was argued at that time without any particular reference by Mr. Davis to come before Mr. Hughes' deposition. It looked as though there would be time to examine Mr. Sessel, because there was some talk about Cocke's examination soon being

terminated and Leslie's. It became apparent while that was pending that there would be less time to examine Mr. Sessel and that there could not be more than four or five days before the Hughes deposition of February 11 during which Mr. Sessel could be examined.

Aside from that point, the Special Master in his order of December 28 stated:

> "* * * in order that there would be no doubt left that it was my purpose and intention to proceed [24718] with the taking of the deposition of Mr. Hughes by the plaintiff beginning February 11, 1963, at 10.00 a.m. in Los Angeles, at the place designated in the notice."

He affirmed that was his intention. He then denied the motion to examine Mr. Sessel on this ground, among others:

> "I do not think it would advance the proper administration of this case since it would in my judgment inevitably branch out into the issues of the counterclaims, or result in such continuous controversy that it might interfere with the taking of Mr. Hughes' deposition at the time and place fixed."

I have pointed out that your Honor has placed in the Special Master the discretion as to the question, first, of whether or not to vary the schedule of depositions and how to arrange the depositions, and, secondly, you have stated that the Special Master had special competence to see to the application of the limitation that there should be no examination as to the counterclaims. He has exercised that discretion.

Now, actually, this application before your [24718] Honor of Mr. Davis is an application to request that you reverse the Special Master's decision on the ground that there was an abuse of the discretion, since your Honor left this matter entirely to the Special Master's discretion. I think it is a most extraordinary thing to ask this Court to review the exercise of discretion by a lower court, to come in and present to you a very lengthy affidavit with innumerable affidavits attached to it, none of which were presented to the lower tribunal at the time the matter was presented there.

Mr. Davis made a long speech that some of them may have been in the record, and the Special Master if he looked through this voluminous record and if he had clerks to do so, he might have found some of them. But none of this material that they present to your Honor in an effort to show that the Special Master abused his discretion when he said there would be no interruption to permit an examination of Mr. Sessel and because it might involve examination as to counterclaims, and tried to show that that is unreasonable by presenting to your Honor totally different facts and totally different affidavits. It seems to me to be a highly improper procedure.

[24720] In the first place, he has changed his grounds very substantially here. Now there being no time for an examination of Mr. Sessel, as far as I can see, because, as Mr. Davis pointed out, the Special Master has to argue a case before the Supreme Court which will take up all of this week and next week, Leslie will be on the week of the 21st, and then Cocke will be on the week of the 28th, and there will be, no doubt, considerable examination there, and the Special Master said he had a considerable number of

questions, and by the week of February 4th we are all going to be packing up to go to Los Angeles. So that really he is now making a plain application here to ask your Honor to reverse the Special Master's order of October 25 setting down the examination of Hughes for February 11. He didn't appeal from it; he never objected to it. He never actually said that is what he is doing, but that is the only implication in his present motion. He said he wants to examine Sessel first and Wadsworth, which means there won't be any examination of Hughes in probably six or eight months.

Your Honor pointed out if he really wants to make a motion to dismiss and if it had any merit in it, the first thing is to get through with the [24721] examination of Mr. Hughes, and no such motion can be granted until that is done. He is trying to get other witnesses involved here in order to postpone the day when Mr. Hughes will have to stand up and be examined.

I submit if his application is granted we won't see Mr. Hughes for eight or ten months or a year. Then we will see other witnesses. The idea of bringing in all this Cocke testimony and all these matters before your Honor have nothing to do with the motion whatever. Moreover, he never made any such application before the Special Master. He never asked the Special Master to postpone Mr. Hughes' examination. He said he wanted to examine Mr. Sessel to find out more of these facts.

Another point I want to make clear is that these affidavits, particularly Mr. Davis' own affidavit, conclusively confirm the wisdom of the Special Master's determination that it would be inappropriate to examine Mr. Sessel because it would be impossible to disentangle questions relat-

ing to the complaint from questions relating to the counterclaims. The burden of Mr. Davis' affidavit, which, I say, was never before the Special Master, is that he has evidence to produce, according to him, that Mr. Sessel and others were instrumental in having this complaint and this lawsuit [24722] brought with improper motives in order to take away Hughes' control and obtain control of TWA for themselves, and that it is all part of this conspiracy. That is the counterclaim. I submit to your Honor that I don't see a single subject mentioned in this Davis' affidavit where he outlines what he is going to talk about. On page 12 in his affidavit I don't see a single subject there as to which I could permit Mr. Davis to ask Mr. Sessel a question without objecting on the ground that he is attempting to examine him on the counterclaims. It may be they have some relation to the complaint, although it is a novel idea to me that in arguing that a complaint does not state the cause of action, you say it was brought in bad faith by the client who told the lawyer, "See if you can't bring a complaint that will bring about such and such a result. That has nothing to do with the validity of the complaint. This is nothing but an attempt to adjourn the examination of Mr. Hughes and to examine, if possible, Mr. Sessel on the counterclaims. There is nothing here to show that Mr. Rankin didn't act in the best of discretion, and, if anything, his discretion has been confirmed.

[24723] I would like to add one personal matter, your Honor: Mr. Sessel has been trying since last October to take a six-weeks' trip around the world, and he has had to postpone it twice, the last time on January 4th. He is leaving on Friday and he would like a decision at the earliest time, your Honor.

Pretrial Hearing, January 9, 1963

The Court: Mr. Stewart, you represent Wadsworth?

Mr. Stewart: And Dillon, Read, yes, your Honor. It is very difficult to assess any kind of reply, either to Mr. Davis' argument here or to the papers, more than 100 pages, that were served on us late yesterday afternoon. Dillon, Read is hardly mentioned. There are one or two references to the fact that Dillon, Read worked on the financing for TWA which later became the 1960 financing. There is no dispute as to that. We admit that. I don't know whether to be flattered or insulted by this omission of any justification for taking the deposition of Wadsworth at this time. But one thing that Mr. Davis said I thought was very interesting, and that is, it is not at all clear that he even plans to examine Mr. Leslie, the financial vice-president of TWA who worked on this financing, as to the facts, the negotiations, the [24724] conversations that were held in connection with this financing.

I have read the Toolco papers, and the same question comes to mind, your Honor, why was Dillon, Read added in this lawsuit?

The Court: You have asked that question before, Mr. Stewart. Nobody wants to give you an answer.

Mr. Stewart: They have not done so so far. We have been in it a year and we have not had an opportunity to examine the man who is responsible for bringing these charges against Dillon, Read.

Your Honor knows that Mr. Wadsworth was the officer at Dillon-Read who was primarily responsible for the so-called Dillon, Read plan for the financing of TWA. In working on this he kept a diary, a day-by-day diary of his telephone calls, of his negotiations, his conversations with the banks and insurance companies who were the prospective lenders to TWA. The diary is voluminous. It is about

500 pages of foolscap altogether. Toolco got that diary, your Honor, by a subpoena before Dillon, Read was named as a party defendant in this lawsuit, along with a bunch of other material. They have had it now for [24725] close to a year and a half, I believe, and Toolco admits as recently as our argument on this application on December 11 that they find nothing in this diary which casts any light as to the facts upon which TWA relies in support of its complaint. I can see this situation developing though, your Honor, with this diary and with these personal notes of Mr. Wadsworth, if the prior examinations of Toolco are any criterion, I can see an examination of Mr. Wadsworth going for weeks, months, on end.

Now, since Dillon, Read is concerned solely with the financing and that is their only part in this case, the financing of 1960 and the subsequent financings of TWA, and the counterclaims are essentially dealing with the 1960 and subsequent financings, any examination of Wadsworth could concern itself with just one thing, and that is the heart of the issues in the counterclaims.

Toolco has had priority for a year to find out what they are being charged with. They are not interested in pursuing TWA's statement that 75 per cent of their case is going to be developed on the examination of Mr. Hughes. But one thing is very certain, your Honor, they can't find out from Mr. Wadsworth what the facts are that TWA relies on in support of its complaint. [24726] Nothing he says, nothing he does not say could bind TWA in any way.

Mr. Wadsworth was not consulted in the filing of the complaint by TWA against Toolco, and I suggest that any inference that Toolco can find out from Mr. Wadsworth what TWA's case is is just sheer nonsense. He is not an

officer at TWA, he is not a director of TWA; he is not an employee of TWA. He can't possibly know.

This file of voluminous material served on us, your Honor, just proves one point to me, that Toolco will claim anything, say anything, do anything to prevent the deposition of Howard Hughes taking place on February 11, or any other date, for that matter.

I respectfully urge, your Honor, that you affirm the ruling of the Special Master.

The Court: Mr. Sonnett.

Mr. Sonnett: I think Judge Bromley is next in our agreed batting order.

Mr. Bromley: May it please your Honor, I really think this is an attempt on Mr. Davis' part just to get rid of the Hughes examination for as long a time as he can, and I call to your Honor's attention in support of that accusation to paragraph 22 on page 15, where he says, [24727] "Toolco respectfully submits that it is entitled to priority in discovery under the circumstances here present in accordance with the prior orders of this Court; and that, accordingly, it is entitled to the examination of Sessel and others before the deposition of Hughes is taken."

[24728] Now, if you turn back to page 2 at the bottom, you will see another device in the making:

> "Toolco expects shortly to bring on a separate application for appropriate protective relief with respect to the current efforts of TWA to take the deposition of Hughes before plaintiff has divulged the justification for an antitrust complaint, whether by way of answers to interrogatories or otherwise."

Your Honor, we are making expensive and extensive preparations to go to Los Angeles confident of your Honor's decision, and if any such further devices delay this are in the making, I think he ought to do it very promptly, and if Mr. Hughes is not going to show up on the 11th, I think these gentlemen ought to tell us before we incur all the thousands of dollars of expense and all the moving out there only to find out that he does not appear.

I endorse everything that has been said and that which is now to be brilliantly said by brother Sonnett.

The Court: Mr. Sonnett, with that introduction do you want to talk or do you want to rest?

Mr. Sonnett: Judge, I am afraid to say anything for fear of spoiling it, but there are a few points that [24729] I feel I must say. Obviously, in respect of the deposition of Sessel or Wadsworth, I have no direct interest, except insofar as it impinges upon the progress of TWA's case. No doubt in due course both will be deposed. No doubt in due course both will be important witnesses on various matters.

But in respect of my problem, which becomes increasingly acute, may I say to your Honor that the needs of TWA to advance its discovery after the defendants have had a year, the needs are acute. TWA's 1962 year will show according to its president at best a break-even, more likely a loss. This litigation is expensive. When I say, as I have said and repeat to your Honor, that I expect 75 per cent of the evidence we will use at the trial to come out of the mouth of Hughes, I am not saying that rashly. I expect that. And I would like very briefly to demonstrate to your Honor why I think that is so and why I think

we need to go forward as quickly as possible with the Hughes deposition.

We have withdrawn our application that you set the date earlier than February 11th because as a practical matter it is apparent that we could not start before that, anyway. I think your Honor will realize that we have no desire to bore you with statistics, but [24730] we have in terms of discovery in this case so far on the documentary side produced over a million pieces of paper, that is, TWA, that the Hughes Tool Company has produced 325,000, that Dillon, Read has produced 18,000, Irving Trust 30,000, Metropolitan Life, 5,000, Equitable, 35,000, Bank of America, 12,000, the Chadbourne firm, general counsel for TWA, 20,000, from the CAB files 12,000, The First Boston Corporation, 3,000, Merrill, Lynch, 2,500, Atlas Corporation, 1,000, the Mellon Bank, 2,000, Charles Thomas, a thousand—approximately 1,700,000 pieces of paper have been produced so far on the documentary side of the case.

The Hughes Tool Company has had all that and they have had a solid year, and if Mr. Davis' count is 80 days, mine is 83 of solid question and answer discovery. We have not had a day. I don't know how long Mr. Hughes is going to be around to be examined, but I do know that he is the one person who has what we need the most. We need to know the decisions at the highest level which Hughes made, and there is no mistake about it, he is the one who made them, and we need to develop out of his mouth, and we will, the reasons why he made the decisions he made.

We start out, your Honor, with a handicap by [24731] the fact that the Hughes Tool Company counsel completely disregard the discovery which they have had to date. For

example, they would brush aside the entire Tillinghast deposition as if it did not even enlighten them as to claims concerning 1961. It does. And I think it contains very significant evidence relating to the efforts of Hughes to ram 990's down the throat of TWA at a time when the independent management for the first time wanted other aircraft, as to what Hughes and his representatives did in that connection at a time, mind you, when there was a voting trust in existence and Hughes was presumably out of control. Now they disregard the Tillinghast deposition.

They would minimize and disregard the Rummel deposition, and a reading of that record is very enlightening, because every time counsel for Hughes Tool came to an area where it was obvious the witness was going to hurt him, he backed away, and at one point it became so obvious the Special Master himself took over the questioning, because he said to Mr. Davis on the subject of whether Hughes had instructed Rummel to boycott airplane manufacturers, except the one chosen by Hughes, Davis does not pursue that, and Mr. Rankin said, "I don't think the record ought to be left that way." [24732] and he pursued it, and the witness testified that he had had such instructions. This is the man who worked with Hughes closely and intimately and knew all subjects connected with the procurement of aircraft. He was a man—and this is not a reflection in any way on him—on the payroll of both Hughes and TWA. He is a high man in his field and he is an excellent witness and is very useful in support of TWA's case.

Now, as to the production of the present set of papers quoting Cocke as to what Leslie said to him, after examining Leslie for 18 solid days they have just reached the beginning of the jet period in their examination, and counsel

for Hughes Tool Company says to you with a straight face presumably, well, he may not want to get into that particularly. The reason is pretty obvious, because I think he had forgotten things, like the document I have in my hand, which they have had for many, many months. This is a document in Mr. Leslie's handwriting. It will be used on his cross if Mr. Davis does not use it on his direct. It was written in the spring of 1960 when both TWA and the Tool Company were on the verge of receivership because of the actions of Hughes. And in that document, among other things—I am not going to go into all of it, [24733] because, as your Honor can see, it is very lengthy—it is headed "TWA; In Appreciation"—in that document, Leslie, the man who has been on for 18 days so far, says, among other things—this is at the very beginning, under the heading of "Background":

> "During 1956 Hughes Tool Company acting through Mr. Howard R. Hughes placed orders for 18 Boeing 331's, 15 Boeing 131's, and 30 Convair Model 880 jet airplanes. . ."

stated at the time and repeated many times since to be for TWA's use.

Skipping down:

"It was stated by Hughes at the time the orders were placed (among others the writer) that TWA was not to concern itself with the financing of this equipment as he through Toolco would find the required funds."

Later on after Mr. Leslie has been analyzing the history and the situation of TWA, he comes to the conclusion, among others that:

"TWA with Equitable should sue Toolco-Hughes for damages due to implied contract default."

There are other discussions about TWA to assert claims against Hughes. That was in March or thereabouts of 1960. It represented the judgment of Leslie, who, I [24734] might add, at one time was in the employ of the Hughes Tool Company for some years in a financial capacity, and also with TWA. Leslie has not been asked about that. They have had this piece of paper for months. I think what this shows is that there are none so blind as those who will not see. If counsel for the Tool Company would take a look at the documentary evidence they already have, they would be very much enlightened about various of the problems that face them in this case.

Now, on the Hughes deposition and the need for getting forward with it promptly, I represent to your Honor that it is provable, and without pulling out all the documents, that it was a cardinal policy that Hughes throughout maintained that there be secrecy concerning everything. There are documents in which he instructs people, "Don't make notes of this," "Keep this a secret." As a matter of fact, there is one which is, I think, so amusing and pertinent and it is brief, that I would just like to read it to your Honor, because it comes out of the mouth of Mr. Holliday's secretary, and it is really quite a commentary on the secrecy rules which Hughes rigidly enforced. This is a letter written by Laura Lee, who is Mr. Holliday's secretary, to Mona Lee; who is Leslie's secretary.

[24735] The Court: Where does Lola Lea fit in?

Mr. Sonnett: I don't think there is a relationship, but perhaps we can judge better after reading the letter. Perhaps she is kindred in spirit. It says as follows:

"Dear Mona Lee:

"I am trying to work up some information in regard to all of the subsidiaries of HTC and all companies in which we own stock, etc. and as usual, it isn't easy to find out the simplest information. We do carry secrecy to extremes in some cases, in my very humble opinion!

"Would you be good enough to furnish me the following on TWA: State incorporated in; date of incorporation; and the date set up for the annual stockholders meeting each year. I assume that you will not have to get a security clearance and be fingerprinted and all that stuff to furnish this meager bit of information to a fellow employee.

"Many thanks . . . . . and what would I do without you????????

Laura Lee."

[24736] When it get to a state where a secretary does not know in what state TWA is incorporated in, I think we have some idea of the extremes of the policy.

I might say that Mr. Leslie himself, for example, in 1955 in writing confirmed in a letter to Mr. Damon that the usual policy of everybody being sworn to secrecy was followed in a recent meeting with Mr. Hughes, this being the standing order of business.

Further, if one looks at these call sheets that record in part these telephone messages coming from headquarters, one is struck by the number of entries which say "Omit: they talked." It is astonishing the number of them.

But as to those fortunately that are available which were not omitted—in retrospect they wish they had

omitted—it is probative on the subject of the motivation of Hughes for what he did here with his co-defendants, and I am not going to take a great deal of time, except to indicate that it is in this type of area that we have our problems and where the need for the testimony of Hughes is absolutely essential to the case, because he is the one who has got the information. It is not in the documents. And under his cardinal policy of secrecy, the others knew just as much as he [24737] wanted them to know, and no more.

In that connection, to advert for a minute to the Leslie view of the situation in March, 1960, his appreciation, in which he said that TWA and the Tool Company both were on the verge of bankruptcy, that TWA should sue Hughes, this is long before we came into it as counsel for the new management, that Hughes in referring to that meeting in his own words said, and I would like to read this, your Honor. Your Honor has heard it before, but I want to follow it up with a brief excerpt from one other document you have not heard, and the two together, I think, illustrate where the deposition of Hughes is going to establish all the proof of motivation that we need to sustain the conspiracy, in addition to enlightening everyone as to what, in fact, was done. This is the call sheet of a call from Hughes, a message from Hughes to William A. Forrester, of Merrill, Lynch, of October 26, 1960. It starts out with the time 12:30 p.m. (Per Opr) Get him on the line.

"INFO They talked."

Then "2:00 p.m."—and this is this message from Hughes to Forrester. "Call him back and tell him that

for his information that Charlie Thomas—[24738] parenthetically the then president of TWA—"negotiated and developed the deal with Dillon Read financing plan without my authority or encouragement from me; he forced it down my throat then at a Board meeting at which time he created a coalition of my directors and turned them against me and faced me with a mass resignation of all but one of the TWA directors. I have never liked this plan; I have never been in favor of this plan; I have fought it from the very beginning and I am still fighting it and I assure you that if it is employed it will be over my dead body and if you would like to come up with any suggestions of any alternative plan or any way whatsoever by which I can avoid being forced into the Dillon Read program, I would be most grateful. It is very flattering for you to say that you don't think I have ever been forced to do anything and maybe there was a time when this might have been fairly accurate statement, but I assure you it is not true today and has not been true concerning this Dillon Read program from its inception. I have fought it hammer and tong from the very first day that I ever heard of it."

Why? What the Hughes deposition is going to establish, and I have no doubt about it, and it will be established in the first week of deposition beyond any [24739] doubt, that the motivation for what Hughes did as charged in this complaint was a financial one and it consisted of tax avoidance, a specific financial motivation. That is what cast light on what was done and why it was done and how it was done and what led him into the antitrust violations which he and the others clearly committed.

In terms of the motivation, on December 4, 1960, Mr. Hughes apparently had a telephone conversation with Mr.

Carver, of the Bank of America. These are Mr. Carver's notes of that conversation. And at page 3 of these notes in setting out at length a conversation with Mr. Hughes that ran about an hour and a half on the phone. At the end of that Mr. Carver says:

"Three things came to HRH's attention this week anti DR."

What follows makes it clear this is anti the Dillon Read financing plan.

"1. 102 tax situation—it is real bad and three weeks before year end—ML——"

That is a reference to Merrill, Lynch and a proposed alternate financing plan——

"ML is better—have chairman of board and only [24740] need to get one man (Nixon?) so he would have to set out at once to refinance."

Now, there is the proof of why. It was the 102 tax situation. And I think the first week of the examination of Hughes based on things like this plus his tax returns, which your Honor directed that we have, and plus some other documents, are going to supply that background against which the purposes of the acts done will be obtained and will explain why they did get into antitrust violations.

Now, I know of no other way to get that information the way Hughes ran his empire, characterized by secrecy, by being surreptitious, by leaving behind no trails, by instructing people to keep things secret and giving them only part of the information, by sitting in the center of the web and pulling all the strings. He is the one there. I have said and I repeat to your Honor, I believe that 75 per cent of the evidence we will introduce at the trial will come out of the mouth of Hughes during his deposition. Thank you, your Honor.

The Court: The next matter for argument is the question of the attorney-client privilege. Mr. Davis.

Mr. Davis: On the attorney-client privilege I [24741] ask Mrs. Lea to present the matter to your Honor, if she may.

The Court: Certainly.

Mrs. Lea: May it please the Court, I should in the first instance like to point out that the documents that we are talking about and the question that was raised before the Special Master which is on here before your Honor involve communications which are unquestionably communications between attorney and client and to which the privilege unquestionably would apply were it not for the matter of waiver.

The Court: I understand that the documents we are talking about on this appeal have already been reviewed by the Special Master.

Mrs. Lea: That is correct. He has seen the documents. He has stated on the record that these are communications between attorney and client, and if it were not for the question of waiver, they certainly would not be producible.

Toolco, of course, does not take issue with the general statement that if a waiver of the attorney-client privilege has occurred documents are producible. The question and the primary question before your Honor, is whether or not a waiver of the privilege has, in fact, [24742] occurred.

It seems to me that in order to put this question of waiver in proper perspective it is necessary to see what it is the privilege is designed to accomplish. The privilege is designed to protect the confidentiality, it is designed, in a measure, to protect secrecy, an unpleasant word here insofar as discussions between client and attorney are con-

cerned, it is designed to operate to keep from the public generally, often persons not directly involved, that which is passed between attorney and client. Accordingly, it is in our view only when the client does something to destroy the secrecy or to indicate that the policy or privilege no longer obtains that we can say the waiver has, in fact, taken place. This is accomplished, if at all, through a disclosure of the contents of the communication, the nature or contents of the communication. It is that which will indicate if the client no longer wishes to keep the material confidential.

Now, if it is a disclosure which is, in fact, required before we can say the waiver has taken place, it is plain to us, at any rate, that in either paragraph 4 of the answer of Toolco nor in any of the affidavits—specific reference was made to the Holliday [24743] affidavit—that neither of those documents did, in fact, disclose what the nature or the contents of the advice that was given by counsel to client is, nor is there any disclosure of any of the facts or any portion of the communications which passed between the attorney and the client.

Under these circumstances, without any kind of disclosure at all there has not been any waiver. If there be no waiver, there is no compulsion for Toolco to produce these documents.

We do understand that having pleaded advice of counsel, Toolco cannot forever claim that privilege and claim that it need not disclose the basis of that defense, assuming that defense is pressed at the trial, and assuming that Toolco at some point seeks to rely on it. If at the appropriate time it appears that reliance will be placed on that defense and if it appears that information which is now privileged is necessary in order to establish that defense or is necessary to

the opposing parties in order to be able to meet it, then at such time it will become appropriate to make a choice of furnishing that information to the adverse parties, thereby waiving its privilege and giving it up, or waiving and giving up its defense. The choice, however, is [24744] Toolco's to make, whether to keep the defense or keep the privilege, and it can be required to do so, we believe, that is, to make a choice, only at a time when Toolco is called upon to divulge the factual basis of its contentions and its defenses. We have certainly not come to this point as yet.

The plaintiff has not even supplied to Toolco what it claims or what the basis of its motion is. We feel very strongly that the papers before this Special Master are privileged, that there has been no disclosure, no waiver of the privilege, and that opposing parties are accordingly not entitled to any of this information.

However, primarily in an effort to see to it that nobody who claims a need for relevant facts is deprived of the relevant facts, on September 17th Mr. Davis made an offer on the record to opposing counsel in which he said that he would turn over and the Special Master hold all materials which we claim pertinent which the Special Master can turn over to opposing counsel when plaintiff has revealed the basis of its complaint and the Court has had jurisdiction of the subject matter.

In a memorandum which we submitted today Toolco, it seems to me, has made an even more generous offer.

[24745] It is said that primarily and by reason of the fact that we think it is essential before anything else in this case be done that plaintiff be required to answer interrogatories and tell us what this is all about, and if they claim that this material or the documents with respect

to which we claim privilege is necessary in order to permit them to answer interrogatories and having got this information, once they are in position to use it, the will then be able to answer interrogatories, then the Tool Company has offered in its papers to make this material under those conditions and circumstances available to the Court. I don't know that we have heard yet from counsel for TWA as to the acceptability of the second proposal. I don't know.

The Court: I am sure Mr. Sonnett will want to answer your argument.

Mr. Sonnett: I am going to yield to a most charming man at this table, Mr. Kaminer.

Mr. Kaminer: I want to apologize, your Honor, on various counts. First, I may be slightly unintelligible because I am getting a cold, and, secondly, for being here at all, because, as your Honor knows, [24746] I am out of the case for other reasons, because of other engagements, but was brought back because of my knowledge of the subject, and, thirdly, for saying to you again that which you have heard before, because I cannot help it if the same arguments are made to you. I think your Honor's patience is something which I really enjoy.

We have submitted to you a brief which we sent to the Special Master in which we set forth the arguments which had been made to you before and made to the Special Master all over again after you had affirmed his first ruling. Now, today at 3 o'clock I get this new brief containing two points, and I quote:

> "1. Toolco has not waived any privilege by reason of its pleading or otherwise since the answer merely gives notice that advice of counsel will be asserted as a defense without disclosing the nature or contents of the advice relied upon . . ."

Pretrial Hearing, January 9, 1963

I now turn to what has been said to your Honor in this courtroom, that no waiver can result from the mere pleading of the defense prior to the disclosure of the privileged information, except in those cases where, unlike here, the pleading itself discloses the advice.

[24747] That was said to you, if your Honor please, before you affirmed the Special Master's ruling.

But let me go on to point 2:

> "2. While Toolco may be required during the course of pre-trial proceedings to disclose the facts upon which it relies with respect to any given defense or give up that defense, it may not be required to do so until such time as it is appropriate for Toolco to disclose the factual basis of its defensive contentions."

This has been said to you by my learned opponent the last time:

> "The development of further specifications of wilful and malicious interference must await the completion of Toolco's discovery. Until all facts upon which TWA relies are ascertained, the matters with respect to which Toolco asserts its counsel's advice as a defense cannot be determined."

And now we turn to page 14 of their present brief:

> "The development of further specifications of wilful and malicious interference must await the completion of Toolco's discovery. Until all facts upon which TWA relies are ascertained, the matters with respect to which Toolco asserts its counsel's [24748] advice cannot be determined."

How often are we going to say to the Court and to the Special Master that there is no question, that this whole thing is moot. And I am not going to be sweet about this. How often are we going to bring this issue before the Court and have the Court listen to this all over again on the basis of the claim that the answer did not waive anything, that the question is totally moot, particularly, your Honor, after all these affidavits that have been filed, which your Honor has, which the Special Master has analyzed and ruled upon and said of course it is waived, anyway. One of the affidavits says:

> "The activities of Toolco subsequent to 1960 which are alleged to have constituted a malicious and wilful interference with TWA's business as well as a violation of the antitrust laws were taken on the advice of counsel to Toolco that such activities were necessary or desirable in order to protect Toolco's equitable rights."

Well, if that is not telling your clients what the advice was and telling the world what it was, I don't know what it is. There is no issue here of any right or question of whether they should waive the privilege—[24749] the privilege is waived. That is the fact. It happened before the answer, it happened again in the answer, it happened again after that.

Now, let me tell you one other point, and I think your Honor will feel perhaps sympathetic with me for being mad and no longer sweet. In April the Special Master ruled that they furnish a list of all the documents which they wished to withhold. Do you remember the April-May letters were with you on your last ruling——

The Court: May 2nd and May 3rd.

Mr. Kaminer: May 2nd or May 3rd. I want to quote from your last ruling in which you said that not only does it seem that the Special Master had written an interesting dissertation of the law, but the Court sustained the ruling of the Special Master as he has applied the law to the questions presented to him. This was no academic exercise and these May letters were before you and there was a direction that a list of all the documents be furnished. We have not got such a list today.

The Court: I understood from reading the transcript before the Special Master that the purpose of furnishing the list was to provide a background for [24750] argument on the motion. But since the documents were referred to the Special Master and he has now ruled that the privilege has been waived there is no need for giving you the list. You get the documents, according to the Special Master's ruling.

Mr. Kaminer: I don't think that is quite right.

The Court: I have read the whole file before you came to court.

Mr. Kaminer: The Master had made a ruling earlier, as you know, not only as to the waiver point, but as to various other points.

The Court: But the purpose of the list was merely to facilitate argument before the Special Master in the application.

Mr. Kaminer: With all due deference, I thought the list was to be given to us to see what documents were withheld, because I do not believe that all the documents which are withheld, none of them were produced.

The Court: Well, the Special Master has ruled you are entitled to all the documents; so what do you need a list for. He is not withholding any.

Mr. Kaminer: We are entitled to all the documents from a certain date on. There were [24751] more documents withheld prior to that date.

The Court: I understood that all the documents in issue were submitted to the Special Master, that the Special Master saw them, that you did not see them, and that appears from a reading of the transcript.

Mr. Kaminer: The Special Master has recently again when he made the second ruling, your Honor, he told us again.

The Court: As I understand it, all documents were submitted to the Special Master and Mr. Davis, I think, so indicated. Page 122 of the transcript of the September 15 hearing before the Special Master. Counsel for the Hughes Tool Company said he made available to the Special Master all the documents in issue.

Mr. Davis: That was done, your Honor.

The Court: And the Special Master ruled upon those documents when he handed down his ruling. So that the purpose of the list was in case there was a dispute at the hearing you could direct your attention to them. Mr Davis didn't furnish a list because it is immaterial at this point, since the Special Master as it stands right now has ruled that you are entitled to all of them.

Mr. Kaminer: So that you don't misunderstand [24752] my point, at page 164 following this discussion the Special Master again ruled that there should be a list furnished.

The Court: I read that.

Mr. Kaminer: I think we need this list for our protection. The record is now very confused. Let us have a clear list of what is withheld. That is what the Master ordered and that is before you now. That is the ruling on page 164.

The Court: I have a notation of it. Go ahead.

Mr. Kaminer: In any event, what you have been told in this brief is the very thing you have already decided last time. And I think we have reached the point here where there must be an end to this kind of multiplicity of proceedings, where people obey what is ordered to be done. Thank you.

Mr. Barr: My name is Thomas D. Barr. I am one of the attorneys together with Judge Bromley who represent the Equitable and the Metropolitan, and I together with Mrs. Lea and Mr. Kaminer have been on this part of the case, and being somewhat younger than Mr. Kaminer I am not unhappy at the opportunity to argue as he was.

I was prepared to take your Honor at great [24753] length through all of the affidavits that I attached to my affidavit which your Honor has before you and which your Honor, I notice, has seen on several occasions in the past. I am not going to do that. I want simply to say, your Honor, that it is perfectly clear to me the Tool Company has waived the attorney-client privilege with respect to every issue in the complaint and in the counterclaims. That it has done intentionally and deliberately.

You have before you attached to my affidavit the affidavit of Raymond A. Cook, dated November 22, 1961, and filed in the Toolco-Northeast Control case before the C. A. B. That affidavit describes activities of Toolco since 1944. That affidavit, your Honor, I believe is the first draft of the counterclaims. If you read that affidavit next to the paragraphs in the counterclaims you will see that word for word in many respects many paragraphs are the same. The Special Master so found. The Special Master's first ruling at page 4372 of the transcript said just that. That analysis is

not original with me. It was Mr. Rankin's. It is perfectly clear that that is exactly what it is.

In addition to that affidavit, there are two affidavits of Mr. Holliday, one in this case, one in the [24754] C. A. B. Toolco-Northeast Control case. One of them adopts Mr. Cook's affidavit in toto. Both of them set forth in great detail not only the fact that the advice of the lawyer was relied on, but exactly what acts were taken and what was done and what was said with respect to that advice. It is perfectly clear.

Finally, your Honor, Mr. Davis' own affidavit in this case, which is attached to my affidavit as Exhibit C, says on page 4:

> "The activities of Toolco subsequent to 1960 which are alleged to have constituted a malicious and wilful interference with TWA's business were taken on my advice as counsel."

And then for a number of pages thereafter he sets forth what the Tool Company did, what actions he took, and so on.

These men are all attorneys, your Honor. That is perfectly clear. But they are also the attorneys who throughout this whole period of time were doing the basic negotiating on behalf of the Tool Company with all of the other clients. Mr. Cooke and Mr. Bautzer largely negotiated the 1960 financing. Mr. Davis was intermittently involved in the activities of 1961. The Master's last ruling, the one of September [24755] 15, 1962, closes with this:

> ". . . I believe regardless of any pleading there have been numerous waivers by affidavit in which

the whole question of the legal advice over a long term of years to the Tool Company has been presented in support of claims in legal proceedings, and by all of that action I consider that there has been a waiver. . ."

I won't burden your Honor any further. The hour is late. You have read all this material. I am not opposed to having the same opportunity to argue the same question, but I hope the facts are a little different next time and in different form.

The Court: That completes the argument on the matters before the Court. The Court is prepared to rule on the six items and will submit a formal pre-trial order and file it by 10 o'clock Friday morning. The hour is late now and I am in the middle of a three-month criminal trial. So tomorrow's time is pretty well circumscribed.

In Item 1, which was the ruling of the Special Master adjourning the deposition of Howard R. Hughes to February 11th, Mr. Sonnett's application to withdraw the appeal from that ruling is granted. Item No. 2, [24756] which is the appeal by Hughes Tool Company to review the order of the Special Master denying its application to examine Ben Fleming Sessel and the Irving Trust Company by Sessel and Arthur L. Wadsworth and Dillon, Read & Company by Arthur L. Wadsworth, that appeal is denied and the order of the Special Master is affirmed. In conjunction with that I would like to say that in view of the withdrawal of the appeal by TWA from the order of the Special Master fixing the appearance of Mr. Hughes on February 11 I will take this time as an opportunity to state that I agree with what the Special Master has said and

that this deposition will proceed on February 11 in Los Angeles at the same time and place fixed in the original subpoena.

Item No. 3, the application by Hughes Tool Company pursuant to Rule 16, that application is denied without prejudice to renew on the papers before the Court 30 days after the completion of the deposition of Howard R. Hughes.

As to Item No. 4, which is the appeal by the Hughes Tool Company from the order of the Special Master directing the Tool Company to produce for inspection and copying by opposing counsel the documents with respect to which the Hughes Tool Company claims [24757] attorney-client privilege, the order of the Special Master is affirmed.

As to Items Nos. 5 and 6, which are related appeals, the first one going to the order of the Special Master denying TWA's application to quash or strike interrogatories served by Toolco on October 11, 1962, and the second, which is an appeal from the order of the Special Master overruling TWA's objections to further interrogatories dated November 13, the order of the Special Master is modified to the extent that TWA shall answer those interrogatories 60 days after the completion of the deposition of Mr. Hughes.

I think the resolution of much of this matter, both as to Rule 16 and as to the adequate answering of interrogatories by the plaintiff and the motions which Mr. Davis has been talking about, all will be assisted greatly by the deposition of Mr. Hughes, and I think, Mr. Davis, you will be closer to the resolution of the questions you are raising after Mr. Hughes' deposition than you are now.

[24759]

Pretrial Hearing, January 17, 1963

[CAPTION]

BEFORE:

HON. CHARLES M. METZNER,
District Judge

* * *

[APPEARANCES:]

* * *

[24761] The Court: Gentlemen, I have just received and have not had an opportunity to look at some minutes before the Special Master. Are they necessary for me to have read before we have our hearing this afternoon?

Mr. Davis: They do involve some new matter, your Honor, but I think we could take care of it with statements.

It primarily relates to the efforts made by some of the parties to obtain further documents or matters on the requested deposition of Mr. Hughes, and that sort of thing is covered in there.

The Court: All right.

Mr. Sonnett: I think Pages 90 and 91, your Honor, of the transcript are the matters in particular that the Special Master suggested be raised with your Honor relating to—I just received ours, yours must be at your office.

Mr. Davis: We have not received them yet.

Mr. Sonnett: I would be happy to read them aloud, if you like, it is a half a page, if you don't have your copy of it.

Is that agreeable, your Honor?

The Court: Certainly.

Mr. Sonnett: Reading from Page 90, this re- [24762] lates to the question of where the Hughes deposition should occur and the length of time during which Mr. Davis and Mr. Hughes should consider that question, having in mind your Honor's suggestions at the pre-trial conference in chambers yesterday, the Special Master stated today at Page 90 of the transcript:

> "The Special Master: When I brought the matter to your attention I had in mind that it might be much more satisfactory and pleasant to Mr. Hughes and everyone else involved if we could have some satisfactory place that would provide not only a room where the deposition could be held, but a place where Mr. Hughes and his counsel could retire to at any time that it became a burden upon him and he wished a recess, or anything of that kind, as well, as some adequate room for other counsel to retire to.
>
> "I thought it could be arranged without prejudice to any claims and rights that the parties might have.
>
> "As I see it, it is a matter of accommodation, and I am ready to bring the matter to Judge Metzner's attention and ask him to close the matter as of next Monday at 5 o'clock, and if there isn't some agreement on it, we will just have it at the courthouse. [24763] and that will be the end of it."

There is another paragraph, I suppose, that should be read, your Honor.

> "After we once start, or after it is set, and we all have to make commitments, I don't think it is reasonable this notice to try to move around. I am not willing myself to ask the whole court system to try to set something up for us and do all the things necessary, to inconvenience the Court and the Marshal's office, and other people that will be necessary to help us, and then make a change in it..
>
> "I assume you are not ready to say at this time, Mr. Davis, what you would desire to do, without prejudice."

And Mr. Davis replied: "I have the same confidence that Mr. Barr expressed a moment ago with respect to my outcome of the motion to dismiss."

Meaning that he was not ready to answer the question.

The Court: Yes. Well, I would suggest that regardless of the outcome of Mr. Davis' motion that that decision be made because you may be faced, Mr. Davis, with proceeding on February 11th and obviously arrangements do have to be made in advance as to what [24764] is going to happen so that you could indicate by next Monday where you want this taken in view of the information you brought to the Court's attention yesterday.

However, I have received a letter from you today in which I understand that you have withdrawn from the Court's attention that portion of the affidavit that we discussed yesterday. Am I correct in that?

Mr. Davis: I thought it was the reverse, your Honor. I thought I said that since Paragraph 9 was before your

Honor yesterday, that I was following the suggestion in effect that Mr. Sonnett made which was to file the affidavit with Paragraph 9 excised, and I am submitting Paragraph 9 in an envelope to be filed with the clerk of the court.

The Court: So that Paragraph 9 and the claims of relief based upon that Paragraph is still before the Court for determination?

Mr. Davis: No, the only thing before the Court for determination, your Honor, under the motion and application that I have made is solely that of bringing on our motion to dismiss.

I had asked for the Court the alternative of acceding to a procedure for furnishing the plaintiff with answers to written interrogatories, if it was the [24765] Court's view that such a procedure was necessary in order to consider the motion, and I understood the Court to have stated that it was not prepared to consider favorably a procedure for written interrogatories.

The Court: Is that the sole basis for Paragraph 9 being in the affidavit?

Mr. Davis: That is correct, your Honor. The purpose of Paragraph 9 in the affidavit, your Honor, is solely for the purpose of indicating the substantial burden and risk upon the Tool Company to proceed in a manner indicated by the order of January 10th before the plaintiff has either been subjected to the testing by motion to dismiss based upon the record as it is as of today or after the plaintiff had been given such other and additional opportunity as your Honor may grant to not come in with respect to adducing additional facts now known to the plaintiff, but before any examination of the defendants.

The Court: I will consider that the motion is made on the papers submitted to the Court yesterday, but for the purpose of the record, Paragraph 9 has been separately filed and sealed by the Court, the result being that the notice of motion and affidavit, which you filed in chambers today, shall be entered by the [24766] clerk and these papers shall indicate on their face that there is an additional portion of that affidavit under seal, which has been considered by the Court in conjunction with the applications contained in your notice of motion.

Mr. Davis: That is correct, and I understand that procedure is acceptable to the other parties.

Mr. Sonnett: I have no objection, your Honor, but to prevent any inadvertence of direction of your Honor's present direction, may I apply that Pages 5, 6 and 7 of our memorandum served yesterday which relate to this subject matter be sealed and we will submit a fresh copy for the Court file indicating that those pages have been deleted and are sealed, and would ask your Honor to instruct all other counsel who have the memo to so regard it.

The Court: What are the pages?

Mr. Sonnett: 5, 6 and 7. The entire Point 2 of our memorandum served yesterday.

The Court: All right.

Mr. Davis, you may proceed.

Mr. Davis: Your Honor, I understand that today it is primarily for the purpose of having the record indicating your Honor's ruling with respect to the re- [24767] spect to the request that I have made on behalf of Tool Company or a schedule relating to the submission for determination of Tool Company's motion to dismiss and also with respect to the application of Tool Company for a delayed effective

date of the order of the Court of January 10th requiring a production of privileged documents.

I understand that as a result of the discussion we had——

The Court: You left something out. You left something out. You have three requests for relief in this notice of motion.

Mr. Davis: That is right, your Honor, I disposed of the other one a moment ago. There was a third request for the possibility of furnishing to the plaintiff the answers to written interrogatories under Rule 33, whether they be addressed to Tool Company or to Mr. Hughes or however they want.

Likewise, a voluntary offer to make available to them, notwithstanding our position of privileged documents, all privileged documents at this time, if your Honor concludes that plaintiff should have that additional information before being subjected to my motion to dismiss.

[24768] To put it differently, your Honor: I conceive of the question that is confronting us now is that the plaintiff has claimed and is now claiming that it is entitled to examine the defendant, particularly Mr. Hughes, who is a named defendant, at this time, based upon the record to date and without any further disclosure to the Court than has taken place as of today.

On the basis of the Court's jurisdiction over the subject matter of this action, and we are resisting that effort on the part of the plaintiff. In resisting that effort, we have made two suggestions on which we are about to get a ruling on the record based upon our conference of yesterday.

The Court: Make a fresh record. Yesterday was a pre-trial conference. Today is just a pre-trial.

Pretrial Hearing, January 17, 1963

Mr Davis: All right, your Honor, I don't want to burden the Court——

The Court: You want a record, Mr. Davis, and you are entitled to it, so go make it.

Mr. Davis: It is our position, your Honor, that particularly under the decision of the Supreme Court in the Panagra case that came down, this plaintiff, by filing this complaint, has improperly invoked the jurisdiction of this Court.

[24769] I further submit to your Honor that a defendant is entitled to have not only the question of the Court's jurisdiction passed upon by the Court, but is also entitled to an adequate definition of the factual issues or, to put it in other words, the wrongful conduct alleged before the defendant may be required to testify.

The time has come when your Honor had indicated by its Order of January 10th that it was the desire of the Court to permit the plaintiff to examine Mr. Hughes.

Therefore, we are approaching the problem in two fashions: First, I say we are prepared to give additional information to the plaintiff, additional to the information he has now or had at the time he filed the complaint, and I am prepared to voluntarily give him these privileged documents.

Now——

The Court: You mean after the Court ruled?

Mr. Davis: I beg your pardon?

The Court: You are prepared to voluntarily give him the documents after the Court ruled you should give it to them?

Mr. Davis: I meant waiving the objection that we have to a voluntary—I say voluntary—I say without [24770] relying upon the direction of the Court to do it.

Secondly, we are prepared, if as plaintiff has been claiming and as we understand plaintiff's position, that a Rule 16 procedure would be premature, and that their answers to interrogatories are premature because they need to examine Mr. Hughes. I am questioning the validity of that argument.

If the plaintiff is not able to identify to the Court now the wrongful conduct which they claim is within the scope of the jurisdiction of this Court, I believe that the complaint ought to be dismissed and that is what I want to test.

I understand on that aspect of the matter your Honor has indicated—I don't know whether I should have a ruling on each one of these points first——

The Court: You just make your argument and I will hear the other people and then I will rule.

Mr. Davis: All right.

Leaving aside that offer that I have just indicated, we come to the question of fixing a schedule for the hearing and determintion of the motion to dismiss. In that area I call the Court's attention to the fact that that motion in part, only in part, will be based upon admissions on the record to date by the plaintiff [24771] in the court of the oral examination which the defendant was permitted to conduct under the prior Orders of the Court.

I want to call the Court's attention to the fact that the examination of Mr. Cocke is not completed by reason of the direction of the Special Master under circumstances which, if your Honor wishes to go into, we have been requested by the Special Master to discuss with your Honor——

The Court: I have read the transcript of the hearing involving that point.

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Mr. Davis: Today the Special Master indicated that by reason of certain questions personal to Mr. Cocke, he will be prepared to dispose and permit me to conclude whatever scope of further examination he directs me to conduct at some future time and, as I understand the position of the plaintiff and the additional defendants, they are not concerned about eliciting any additional information from Mr. Cocke.

The second thing I want to call to your Honor's attention, however, is that Mr. Leslie's deposition has not been completed.

And that today Mr. Sonnett marked for identification a document, parts of which he read to your [24772] Honor in the last argument that we had, which resulted in the January 10th Order, for the purpose of requesting Mr. Leslie to translate these written notes and obviously indicating that he would expect to use that material in opposing my motion to dismiss.

He also stated, or confirmed, on the record today what previously appears on the record, that TWA had substantial cross-examination of Mr. Leslie.

Mr. Leslie, up until very recently, was a senior vice-president and financial treasurer of TWA, familiar with the financing aspect of this transaction involved in the acquisition of aircraft that this complaint talked about.

In that regard, your Honor, the position of the Tool Company is simply this: That the plaintiff be denied his cake and eat it too. Either they want to stand on the proposition that they are entitled to examine the defendant, Mr. Hughes, now based upon the showing they have made to date, or it is their position that they want an opportunity to develop more facts before they take the position they are entitled to examine Mr. Hughes.

As far as I am concerned, they can have either position. I respectfully submit they should not have both.

[24773] In other words, I am prepared to submit for determination by the Court, pursuant to whatever schedule the Court fixes, that my contention that this plaintiff, based upon this complaint and particularly the decision of the Supreme Court of the United States, is not entitled to stay in this court and to pursue the defendants in this way whatever or, I am prepared to consent to any schedule your Honor may fix which would give an opportunity to the plaintiff to develop or adduce any more facts out of TWA.

It is my position that it is the plaintiff's responsibility to establish facts justifying invoking the jurisdiction of the Court. They can not invoke the jurisdiction of this Court based upon what they do not know, but expect to find out from Mr. Hughes.

Obviously if they have got some other documents which they think are relevant or pertinent that they want to use in opposition to the motion, I would just expect an adequate development of whatever the facts are in connection with whatever document it is, according to the direction of the Special Master.

I don't want my position in this regard to be construed as it is likely to be construed as another attempt to delay anything.

[24774] With the Supreme Court decisions of the other day I am satisfied that I can proceed and should proceed with the protection of the rights of my client, especially the heavy burden of expense that this litigation is causing. I do recognize, in fairness to that, the plaintiff may assert and may assert later, and that is why I want to preclude it if I can, the assertion that, oh, well, there was a lot more

that Mr. Leslie knew, but we didn't have an opportunity to complete Mr. Leslie.

I will make one more comment with respect to the schedule, your Honor, because I have in mind what was discussed informally yesterday with all of the counsel.

In connection with the fixing of this proposed schedule, I appreciate the fact that plaintiff is pressing your Honor for a schedule which would permit the possibility at least of a determination of this motion prior to February 11, as if that date is any more sacrosanct than any other pre-trial Order as to the deposition of other witnesses; but I am fully aware——

The Court: I should not use the word "sacrosanct" in that Order, should I?

Mr. Davis: But I am fully aware of the strong expressions made by your Honor in that regard. What I want to call to your Honor's attention, which I did not [24775] do yesterday, your Honor, is that among the other burdens which I already have and may concur momentarily, I am confronted with a briefing schedule in the Delaware action, which also involves a motion to dismiss with respect to Mr. Hughes. That schedule involving a brief this coming Wednesday and oral argument this coming Friday. That is an action which, of course, is being guided and controlled by Mr. Sonnett of Cahill's firm, I should say, on behalf of TWA.

I have no doubt that I can obtain an adjournment or an extension of the schedule in Delaware if I had a little cooperation from counsel here, and I would like to suggest that the Court could be of some assistance to me in obtaining that cooperation if your Honor has in mind the kind of a schedule which was discussed yesterday.

Now then, I come to the last application for relief, which is contained in the papers that were filed last Monday, and that is in connection with the Order of the Court affirming the decision of the Special Master with respect to the delivery of these privileged documents.

In that connection I merely want to point out that the delivery of those documents results in irreparable [24776] consequences, not merely with respect to the documents themselves, but with respect to the subject matter opened up by those documents.

I want to be sure that your Honor understands that the issue here is not whether or not these documents are in fact communication between attorney and client entitled to the attorney-client privilege, but for a waiver, that the issue of law that has been decided by the Special Master, and affirmed by your Honor, is as to the effect of a waiver by a mere pleading of a defense advice of counsel without an identification of the nature of the advice.

The Court: What about the affidavit?

Mr. Davis: Likewise the affidavits which state that what was done was done pursuant to advice to counsel, but does not disclose the nature of the advice. The presumption is that what was done was done because that is what counsel advised, but conceivably they did exactly the opposite of what counsel advised.

There is a statement by the Special Master of other conduct, but there has been no determination of what other conduct is being referred to.

I do recognize that—bear in mind, your Honor, that this is a defense which is asserted before the [24777] defendant knows what the plaintiff is claiming, he knows now a little bit more in this wilful prosecution, we do realize that so long as that defense remains the plaintiff is entitled to inquire into it, but I submit and that is the whole issue on

which I so far have had adverse rulings of the Court that the time within which the defendant has either to abandon the defense or disclose the nature of the advice, is when it is his turn to be deposed, to testify in pre-trial proceeding of some kind.

That is the issue of law which I would like to preserve, if I may, for some Appellate review or, at least, until such time as the Court has had an opportunity to pass upon this jurisdiction question and, therefore, the relief which I am not seeking with respect to this production of documents is that the Court consider delaying the effective date of the production of those so-called privileged documents at least until the Court has acted upon this motion to dismiss, which is about to be scheduled.

Now, alternatively, so that I won't have to stand up again, I have indicated yesterday that should, contrary to my expectations, the Court not look with favor upon that delayed date, that then I would like a [24778] reasonable opportunity to try to get some additional relief if additional relief is, in fact, available to me.

Now let me address myself for the moment as to what harm we are talking about by delaying their obtaining these documents, these privileged documents.

Is it for the purpose of opposing my motion to dismiss? Presumably they know what the course of conduct is which they claim, I don't know what they have to prove in a motion to dismiss, but can't they identify what it is they are claiming without these communications between attorney and client?

Presumably it is for the purpose of preparing for the examination of Mr. Hughes. This presupposes, of course, that the motion to dismiss is not granted. They say that is

what we assume and we are entitled and getting ready for that eventuality.

Everything that has been said on the record, your Honor, indicates that the examination of Mr. Hughes is to be protracted. Sonnett made that statement on the record, several months. These additional defendants want to examine on the counterclaim even though they haven't filed an answer yet to the counterclaims because they got extension of time from the Special Master; as [24779] I recall it, that so long as the motion is to dismiss the counterclaim, which they did not make, but TWA made, was pending, they did not want to have to answer the counterclaims.

They want to examine Mr. Hughes on February 11th. We have no answer to the counterclaims yet.

Now, I submit, your Honor, that considering the possible injury to Tool Company, if we should be right, either with respect to our motion to dismiss or on this question of law, as compared to the injury which is likely to take place or the handicap to these plaintiffs and additional defendants in examining because they are not able to obtain what normally no one obtains, namely, privileged communications between attorney and client, leaving aside whether or not I made a mistake in my pleading, is hardly to me a reason for saying that it is of importance that they obtain the documents now.

Therefore, I respectfully submit that on that issue the Special Master has seen all these documents and I would have no objection for the Court inquiring of the Special Master as to whether he believes that these documents would contain anything which would be of material bearing on any motion to dismiss, but I do resist the production of those privileged documents [24780] at this time because of the consequences to my client if that takes place.

The Court: I understand that you are still relying upon your defense of advice of counsel.

Mr. Davis: No, your Honor, as a matter of fact——

The Court: It is not in the case any more?

Mr. Davis: Your Honor, certainly if it is based—if all they are claiming, the defense of counsel was a defense, if a defense at all, to the alleged wilful and malicious interference of the affairs of TWA.

Tillinghast identified the documents, letters—the letters that he received. If that is all that is involved in this wilful and malicious interference, I don't need that defense, but there again I am caught between several things which have happened. I have been taking the position all along that a defendant had to make a final decision with respect to his defenses only after either a Rule 16 proceeding or answers to interrogatories. But on January 10th I was told I was not going to have that.

Therefore, the question about when need I amend my pleadings, well, presumably, if the deposition of the Tool Company takes place on February 11th, as [24781] presently scheduled, then I have got official date at that point on the basis that I am assuming, but I submit that the issue that the assertion of advice of counsel puts the other side merely on notice that that is a defense which will be asserted at the trial, and that they are entitled to discover that evidence before we go to trial, but it itself does not constitute a waiver of the privilege.

That has been the difference of opinion.

The Court: Plus the affidavits, don't forget the affidavits.

Mr. Davis: Likewise it does not identify, disclose or the nature of the advice. I think that that decision, your

Honor, if it is the law, I presume it is as of the moment, I submit has some pretty serious impact on the proof as a whole, and I believe one which does deserve review to the extent to which a review is feasible, without adversely affecting whatever rights the plaintiffs may have.

My point in this regard simply is that I don't believe that there is any facts which would justify the conclusion that there is any particular harm or injury to the plaintiff at this time.

Now, if we presuppose the motion to dismiss [24782] that that is subject—a certification or otherwise, depending which way it goes, by whatever decision comes down, is likely to be reviewed, there would be an appropriate time to obtain a review of the whole at that time. I respectfully submit that until the Court has made a determination that it does have jurisdiction based upon this complaint and whatever has transpired to date, but not about what is to transpire tomorrow, and that the enforcement of the determination that plaintiff is entitled to these documents on the ground of the waiver of attorney-client privilege is something which should be submitted.

The Court: You have not only moved under Rule 12-B, but also under 56, for summary judgment and there will be affidavits submitted and I don't know whether those alleged privileged documents or, rather, I will go along with you and say that the non-waived privileged documents would not be necessary for the plaintiff to resist your motion.

Mr. Davis: Your Honor ——

The Court: I am sorry, I thought you were finished.

Mr. Davis: I was going to address myself to Rule 56.

[24783] The Court: I was just making an observation.

Mr. Davis: Your Honor, the motion was drawn, of course, before the Supreme Court came down with this Panagra decision. I think you will find that the grounds upon which we present this is not based upon any question of the triable issue of fact. It is true the plaintiff does want to submit some affidavit in that regard and I would be interested in knowing what facts they want to disclose.

The Court: Are you going to rely solely on the face of the complaint to make your motion?

Mr. Davis: Yes, sir, I have two grounds on which I am going to brief, at least it is my thinking as of the moment. One is going to be based solely upon the complaint, the decision of the United States Supreme Court in the Panagra case, and the CAB orders, 44, 50, and the further control case which specifically covered the conduct in relationship of Tool Company with TWA.

The second part of my contention will be predicated solely upon admissions of the plaintiff. I submit, your Honor, that admissions of a plaintiff are not in the same category as when parties submit conflicting affidavits which raise an issue of fact to be filed.

If a plaintiff makes admissions and says this [24784] is what I am complaining about, it becomes part of the complaint and if what he is complaining about does not entitle him to any relief, that is the end of it.

The Court: You mean to say—I don't know what the record shows—but I assume you are referring to the record of depositions that exist up to the present time when you speak about admissions, is that correct?

Mr. Davis: Those contain admissions and not admissions, your Honor ——.

The Court: You are going to put those in and Mr. Sonnett is not going to be able to say there are other por-

tions of that record which I want to come in which may dilute the admissions.

Mr. Davis: Certainly, my point is, Your Honor, that admissions, I was addressing myself to the ——

The Court: Weight to be given to the document.

Mr. Davis: No, to the problem and the cases and the line of cases which relate to whether there is a triable issue of fact whether two parties contend something different.

Now, we may disagree and Your Honor will have to decide what is the nature and scope of the admission, but it is not the same thing as whether I claim that fact "A" two place and the other side claims fact "B" [24785] two places, thereby raising an issue of fact to be decided which as the Second Circuit has said, you don't decide that on summary judgment. That is the only point I was trying to make, your Honor.

The Court: All right.

Mr. Sonnett.

Mr. Sonnett: Your Honor, I will rest primarily on the memorandum which was served and filed by TWA yesterday. I would add to that only very briefly as follows: In response to the answers Mr. Davis has just made to you and since we have a complaint unanswered here, I take it that Mr. Davis' proposed motions are going to be motions for judgment on the pleadings under Rule 12-C and perhaps a summary judgment motion.

12-C, as the Court will recall, provides that after the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings if on a motion for judgment on the pleadings matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment, and disposed of as provided in Rule 56, and all

parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

[24786] As your Honor pointed out repeatedly in the case before, therefore a plaintiff is entitled to discovery by way of deposition and certainly the plaintiff is entitled to present portions of the existing record, affidavits or anything which can confirm that which is going to be presented to the Court by Mr. Davis, which I haven't yet seen.

Accordingly, your Honor, I think the record made today on this problem is so clear that I would feel that I were trespassing on the Court's time, it being now about a quarter to 6:00——

The Court: Only a half a day, Mr. Sonnett.

Mr. Sonnett: It may be for your Honor, but after listening to Dr. Davis all morning, it seems to me like it is several days.

The Court: I have two questions to ask you.

Mr. Sonnett: Yes, your Honor.

The Court: About what is this Leslie deposition. Mr. Davis seems to indicate that one of the basis of opposition to his motion will be a claim by you that you have not completed or started a cross-examination of Mr. Leslie?

Mr. Sonnett: No, sir. Mr. Davis——

The Court: I think I have voiced Mr. Davis' objection.

[24787] Mr. Sonnett: You have, I was disagreeing not with your rendition of what he said, but Mr. Davis would let me better to speak for myself. Your Honor directed that all depositions pending at the time of February 11th would be suspended for the Hughes deposition to commence.

I intend to comply with the Court's orders, of course.

As for Leslie, again Mr. Davis is making a mountain out of a mole hill. The fact of the matter is, as I presented to the Court the last time we had an argument in court, the fact of the matter is that Mr. Davis has crept up very slowly on Mr. Leslie and he hasn't got into the years which will be most enlightening because these were the years in which the big damage occurred to TWA.

If he sees fit to present a motion to the Court based on whatever there may be in the 10,000 pages of record to date, or the one million, seven hundred thousand pieces of paper to date, obviously I will search that record and present whatever I can to oppose it and anything else available to me to oppose that motion.

As to Leslie, Mr. Davis has not completed his direct and at the rate he is going, he won't be through [24788] with that for a while, so the opportunity for cross-examination hasn't arisen yet.

However, because of a purely practical problem, since he applied this morning in a motion to the Special Master, which is in the record that your Honor hasn't had a chance to read, he applied to suspend all depositions until your Honor had determined his motion to dismiss and in connection with that motion, the Master has directed that the Cocke deposition be adjourned without date, the date to be fixed some time after the conclusion of the Hughes deposition, and in response to Mr. Davis' request that the Leslie deposition be adjourned, I said I had no objection but there was a practical problem.

The practical problem was that we had a piece of paper written by Mr. Leslie, a lengthy one, whose handwriting is illegible or almost so, except to him, and therefore urged that in lieu of taking Mr. Leslie's deposition next week, which was set to be resumed next week and since Mr. Davis

was asking that it be suspended, that the Special Master should, if he saw fit to do so, send the handwritten notes to Mr. Leslie and ask him to dictate a translation and send them back to us, since the content of that document would be of considerable use not only on the motion, but also on the deposition [24789] of Mr. Hughes, and the Special Master saw fit to so decide and has undertaken to do that so that there isn't any problem in respect of the Leslie situation.

The Court: The next question I want to ask you, Mr. Sonnett: Mr. Davis said he had some problems regarding time because of a Delaware proceeding. Is it within your power to "get off his back" concerning the Delaware proceeding?

Mr. Sonnett: The difficulty there which involves, of course, entirely different offenses and different damages is——

The Court: I am just thinking about time. You know the date that I preliminarily set yesterday.

Mr. Sonnett: Yes, your Honor. May I say to your Honor this that it has been as difficult to get Mr. Hughes to come in to that court as it has been in this and that dilatory tactics followed by Mr. Hughes finally led—after an appeal—finally led to a holding that he couldn't attack the sufficiency of the complaint against him individually there without making a general appearance.

Finally that was settled on appeal and, by the way, all TWA's way, I might add, and finally Mr. Davis brought on his motion. He has been talking about this [24790] Delaware case where, by the way, they are represented by very competent counsel, Judge Tunnel, a former member of the bench down there and a very able advocate, easily as good as what we see in any courtroom.

Judge Tunnel has argued a good many matters before. I haven't found it necessary to argue down there except once on a preliminary matter about a year ago. He has been talking about a motion to dismiss the complaint against Hughes individually in Delaware for a long, long time, back since May, at least, of this year.

He has made his motion. He has submitted his brief. We have put in our answering brief. It has been served and filed. The vice-chancellor has set the matter down for argument, I do not intend to argue it and I don't see what his problem is.

Mr. Davis creates these very problems for this very purpose. That is to say, that only he can attend everything that may be involved in the Hughes situation no matter where it is and then urges that upon the Courts as an excuse for delay.

If your Honor, despite what I have just said, were to say to me that you think that the administration of justice would be furthered if we were to consent to an adjournment, I would say to your Honor, we would ask [24791] the vice-chancellor to do so cheerfully, because we will follow any suggestion your Honor makes.

The Court: Well, I can't direct you as to what you should do.

Mr. Sonnett: I only want a suggestion if your Honor feels your Honor should make it.

The Court: Well, I think that it would be helpful in view of the tremendous burdens that Mr. Davis says that he is involved in and I am not going down the collateral road to find out whether those burdens are as heavy as he said they are or not, but in view of the position that you have taken in the proceedings in this court, I would say

that if it was possible for you to relax the schedule that is imposed upon Mr. Davis in Delaware, that you should do so if it does not prejudice your clients' interests in any way.

Mr. Sonnett: On the assumption, your Honor, that the Special Master is going to rule favorably on a second motion which was before him today, and it was left that rather than speculate as to your Honor's decision, because we were running into conflicting versions of your Honor's tentative thinking as of last night, and I suggested that the Master hear the arguments today and reserve decision until he had your Honor's [24792] Order and then decide these other matters.

One of the motions, which is critically important, involves some additional tax information which will be essential in connection with the deposition of Hughes, and I think very helpful in our position to this forthcoming motion.

I think that the Special Master is going to grant that.

Now that, therefore, will allow a lot of time for Mr. Davis to function on that question, although he doesn't need any help there because Mr. Cocke's firm has worked on the tax problems of Hughes for many years, and is a very distinguished tax partner who could produce all the documents we sought in the motions this morning within a matter of 48 hours.

However, in order—since I anticipate a favorable ruling there and I want Mr. Davis to turn his attention to the more urgent matters involved in this case—I would be willing, your Honor, quite happily, to ask our local counsel, Mr. Fingerly, to ask the vice-chancellor to set this motion down for any time between the 1st and the 11th of February, which Mr. Davis would select.

I believe he is going to be in California on [24793] February 11th, along with the rest of us, if not earlier.

The other alternative, if I may finish, the other alternative is that we will be tied up in this deposition out there and if Mr. Davis insists that he, rather than Judge Tunnel, should argue the thing in Delaware, it will be some months before it is argued.

So I am perfectly agreeable to any adjournment up to, but not later than whatever time it takes him to get to the West Coast for February 11th, whichever date is agreeable to him and to the vice-chancellor.

Mr. Davis: You are not replying to the reply brief, Mr. Sonnett, which you keep overlooking. It is perfectly agreeable to me and I appreciate your cooperation.

Mr. Sonnett: You aren't representing that you are writing the reply brief?

Mr. Davis: Yes, that is so.

The Court: Pardon me, it is getting late and the sun is beyond the mizzenmast, or something like that.

I understand, Mr. Sonnett, that you will try to arrange for a relaxation beyond February 1st of whatever schedule Mr. Davis is under in the Delaware proceeding.

Now, I am not familiar with the schedule except [24794] that he indicated he had to get something out during the period between now and February 1st. All I ask is that, if you can, do this with all propriety with regard to the interests of your client, and if you can, facilitate the adjournment of that schedule so that Mr. Davis will have his time free for these motions, which he wishes to make before this Court in this proceeding.

Mr. Sonnett: Yes. Mr. Tenney, my partner, your Honor, suggests that we can do that quite readily if we

have his reply brief a few days before the argument, we can, I am sure, work that out by agreement.

It may be one of the few things we can work out by agreement.

The Court: Now the last thing. On the attorney-client privilege, Mr. Davis in urging the Court that at least the Court should modify the Order of January 10th to the extent that you are not furnished with the documents prior to the Court's ruling on the motion to dismiss.

Mr. Sonnett: As to that, your Honor, it is very hard to answer because we don't know what is in the documents and depending upon the nature of the advice—and I must say I don't understand Mr. Davis' argument—when something is said that a client acted pursuant to [24795] legal advice, that that may not mean that at all. It may mean that the client acted just the contrary to the legal advice.

I am completely lost there. That is one of the more difficult of the many difficult things I have heard Mr. Davis say, but not having seen the documents, I can't tell how useful they would be in connection with the motion to dismiss.

I don't know whether there is advice in there which is now waived which I could stand up in Court and say, "Your Honor, Mr. Davis, or one of his colleagues back a year ago or two years ago, expressed the legal opinion which I join in today," on some point or another. I can't tell.

As to the question of the damage that will be done by a disclosure, I think that is very badly overstated. We have a situation where the first order to produce this material was made many months ago and by a process of trip, stumble and delay, Mr. Davis has kept them out of our hands for many months despite all the pressure from the Court. To say that to make this material available to counsel in-

volved in this case is going to cause any great public injury, I just don't understand. I don't follow it at all.

[24796] The fact is the Court has directed that we are entitled to have the material. I therefore see no mystery about our having it now as the Court has directed.

The Court: Judge Bromley.

Judge Bromley: I think not tonight, your Honor.

The Court: Mr. Giddings.

Mr. Giddings: Your Honor, in view of the hour and everything that has been said, we will rest on Mr. Sonnett's remarks.

The Court: Mr. Stewart.

Mr. Stewart: No further argument.

The Court: I promised you I wouldn't call on you last next time. I will change that.

I hope to have a formal written order tomorrow, but I am involved in this long criminal case and the committee meeting that I attended between the adjournment of the case this afternoon at 4:30, and coming down here at 5:00, has been adjourned after a half hour because of my leaving until tomorrow at 4:00 o'clock, so that if it is not out by tomorrow at 5:30, it will be out by noon on Saturday morning.

All right.

[24799]

Pretrial Hearing, January 28, 1963

[CAPTION]

BEFORE:

HON. CHARLES M. METZNER,
District Judge

* * *

[APPEARANCES]

* * *

[24801] The Court: Mr. Davis, you filed a notice of motion setting down for hearing an application by you to adjourn taking the deposition of Mr. Hughes. You made it returnable——

Mr. Davis: Four o'clock, February 8th, your Honor.

The Court: Yes, I assume from your subsequent correspondence you are withdrawing that motion.

Mr. Davis: That is correct, your Honor. The only purpose of filing that notice of motion was merely to give your Honor an opportunity by mechanical means to carry out what your Honor indicated you intended to do in your January 10th and January 19th order, and at this time I have no motion or application to make.

The Court: You don't have to actually because I think I indicated in that order that after reviewing the papers, if I thought the deposition should be adjourned, I would notify you to that effect.

You did not have to——

Mr. Davis: Your Honor, it was just a question to have something before your Honor to [24802] act upon. That was the only purpose that I had in bringing on that motion, and I am pleased to withdraw it at this time.

The Court: Secondly, we have your application to review the order of the special master regarding the production of the so-called tax documents.

Mr. Davis: That is correct, your Honor.

The Court: Let us hear argument on that.

Mr. Davis: All right, your Honor.

I am not prepared to present to the Court at this time all the facts and circumstances relating to the problems of the Tool Company in connection with the production of those documents. I have been in communication with Mr. Holliday in Houston, who in turn reported to me the information he obtained there. I am prepared to give that information to your Honor orally now.

I would hope to have an opportunity to submit an appropriate affidavit identifying what those circumstances are and perhaps more fully or accurately than I can state them now.

I am sure your Honor will appreciate that I have been addressing myself primarily to the problem [24803] of the papers that I am to file by February 1 on the very important motion to dismiss that we have brought on, which is now pending before your Honor.

Quite apart from any other consideration, I am informed that in order to review the files which would have to be reviewed to reduce the documents which are called for by the schedule annexed to Mr. Hupper's affidavit it would require a review of substantially all of the same files which were reviewed once before in connection with the production of documents which was made pursuant to your

Honor's order of, I believe it was, March of last year. In other words, there is no way that all the documents called for by that schedule could be produced other than by reviewing substantially all of the files, both in Houston and in Los Angeles, which were reviewed once before.

I am informed that it is the opinion of those who are familiar with those files that probably all the documents called for have already been produced and made available to plaintiff and these additional defendants. To be sure, that does not include the 1961 tax return or the 1962 tax return called for, which is not yet prepared, and [24804] of course that is not available.

I am also informed that based upon the actual cost and expenses incurred in connection with the prior review of the files and production, it is estimated that the cost of doing this at this time would be conservatively at least $150,000.

I am also told that in order to review the files which would have to be reviewed it would take a period from four to six weeks.

I am also informed that at this time, particularly with the year end and the work which has to be done in connection with year-end tax returns, federal and state, the closing of the books, the individuals who are familiar with or who could most readily identify the documents called for, which relate to information that was used in connection with the review by the Internal Revenue of whatever tax returns were filed or whatever questions were raised, are all at this time busily engaged on other matters.

Now, this is the substance of what I was told. I have asked that it be put in affidavit form so I could submit it to your Honor. I expect to have it shortly. I am not in a position to per- [24805] sonally supervise the preparation of the affidavit.

However, in that connection, your Honor, I think that I should also state that the Tool Company believes quite sincerely that the motion to dismiss is entitled to not only the most careful consideration by the Court but, notwithstanding the indications given on the record by the Court, is firmly convinced that the action will be dismissed and therefore has asked me to resist as respectfully as I can granting to these plaintiffs or additional defendants further discovery causing any further expense or burden upon the tool company until after the Court has either decided the motion to dismiss or has satisfied itself that it is a meritorious motion to dismiss.

While I am up I will cover all the ground at once, and, without suggesting that I believe that the Court is likely to require that the tool company incur the burden of expense I have attempted to describe prior to a consideration of our motion to dismiss, I would like to respectfully suggest that, if the Court is of a different view, as in the case of the privileged documents, which the Court's order [24806] of January 10th and January 19th required me to produce—and I exhausted my efforts to obtain a review of those orders unsuccessfully—I be given an opportunity of developing some procedure so that I may have some kind of an order which would be appealable, because I know that I still have to convince your Honor that the motion to dismiss that we are bringing on is a meritorious one.

I believe that when I submit my papers on February 1, and they are not going to be in as well organized a shape as I would like them to be—I am running behind schedule—I believe that your Honor will be satisfied, whichever way your Honor will decide the question, that it is a serious and meritorious question, and I can personally assure your Honor that the desire on the part of the Tool Company to resist further production or discovery proceedings by the

plaintiff at this time is not for the purpose of interfering with the expeditious disposition of this lawsuit.

I would like to finish my remarks by pointing out that somehow or other the issue seems to have developed as to whether or not Mr. Hughes will or will not be available on a particular date [24807] and whether or not the tool company will or will not make further production of documents, rather than the question which basically the Tool Company has sought to bring on for disposition, and that is whether or not this Court should entertain any further the action commenced by this complaint. And I think at this point perhaps I should address myself, unless it would be preferable that I wait in connection with the application which is being made to withdraw the motion to dismiss the counterclaims——

The Court: I assume that would be in answer to what they have to say, because you still do have at the present time the counterclaims pending; so even if you were successful on a motion to dismiss the complaint, you still have counterclaims totaling $385 million for which Mr. Hughes' deposition is also scheduled.

You can answer that after we hear from the plaintiff and the additional defendants on the question of the production of the so-called tax documents, and then I will come back to you, Mr. Davis, because I am sure you will be answering that question on the counterclaims.

[24808] Mr. Davis: All right, your Honor.

The Court: Who wants to start off—Mr. Sonnett or Judge Bromley?

Mr. Bromley: May it please the Court, I take it from what we have just heard that Mr. Davis does not now dispute the correctness of the special master's finding that good cause has been shown for the production of the documents requested under the Rule 34 motion; that said docu-

ments are all relevant; that it does not present a new or novel contention because the plaintiff many months ago was put on notice that we wanted these documents; that we were making the contention that the Tool Company made a profit and received tax advantages from its transsactions.

I take it that he no longer disputes that the documents are important and necessary and that his sole argument is related to the burden and that he wants more time.

Well, the master recognized that there was a burden, but found that it was not an unreasonable one and that he should comply, because it was highly important that we have the documents prior to the taking of the deposition of Mr. Hughes.

[24809] Now, as your Honor has indicated, I am not at all concerned with his motion directed toward the complaint because I am perfectly clear that the counte-claims will stand, and I assert that I have a right to examine Mr. Hughes and to get these documents all in relation to my examination with respect to the counterclaims.

I therefore take it that it is perfectly clear that the special master's action should be affirmed by you and that we should proceed to give our attention to the question of how serious, if at all, the question of burden really is. And I think you, Mr. Sonnett, should express your views in that respect of that matter to his Honor.

The Court: Mr. Sonnett.

Mr. Sonnett: Yes, your Honor. I have a short answering affidavit in connection with Mr. Davis' appeal on the tax document matter. With the Court's permission I would like to serve it and file a copy now. It has some facts which I think should be in the record before your Honor on this question of burden.

The Court: Go ahead.

Mr. Sonnett: Does your Honor wish to [24810] examine that affidavit or shall I paraphrase it?

The Court: You might as well paraphrase it.

Mr. Sonnett: In paragraph 2, your Honor, the affidavit adverts to the findings by the special master based on his intimate familiarity with the discovery matters in this case.

The burden of production on the Hughes Tool Company of these documents at this time is in fact reasonable.

Secondly, in paragraph 2 of the affidavit we refer to that portion of the special master's ruling in which he adverted to the fact that employees and counsel of Houston, Texas, who have for many years represented Tool Company generally as well as in its tax matters, could assist in the production to such an extent that the burden upon Mr. Chester C. Davis and his associates in connection therewith should not be great.

In paragraph 3, your Honor, the affidavit develops the fact—and we believe it to be the fact—that a substantial amount of work has been done previously in assembling various material which will be of help in connection with this matter, [24811] such as supporting papers, work papers relating to financial statements, and other detailed financial information.

That became known to us first about a year ago when they were producing documents at Houston, Texas, and at that time they withheld two or three boxes of work papers which were said to contain supporting work papers relating to financial statements and the like. That matter was brought to the attention of the special master on March 22, 1962, and it resulted in a direction by consent in effect that that material be held in the custody of Mr. Cook's firm for delivery as might be required later.

In paragraph 4 of the affidavit we point out that the Andrews, Kurth, Campbell & Jones firm, which is undeniably one of the leading firms in Texas, has been counsel for the Hughes Tool Company for some 50 years; that Mr. Cook has been personally engaged in the legal and financial matters of Hughes Tool Company for over 10 years, this by their own statements.

Accordingly it seems to us that with the resources available in the Andrews, Kurth firm, the [24812] production can, if there is a will to do it, be made promptly and, indeed, it can be made by Wednesday, recognizing, however, that the matter of production of documents is always a burden on every litigant, as it has been, I can assure the Court, in the case of TWA, where we have produced hundreds upon hundreds of thousands of documents at great expense to our minority stockholders—recognizing that burden, however, our proposal in this affidavit is that your Honor direct that whatever is available now be produced by June 30, 1963, as the master has directed; that your Honor further direct that there be a production on a day-to-day basis thereafter until the production is complete, and that it should be complete on February 6, 1963, which gives them about a week's extension of time to make the production, which the master has found, in fact, could reasonably have been made on the 30th of January.

Now, as to the importance of the TWA viewpoint in having the documents, I think it speaks for itself, your Honor. We want them not only for the deposition of Mr. Hughes, but it is my opinion and belief that these documents, when we get them, may [24813] be of considerable materiality for the motion which Mr. Davis is now at long last bringing on and insisting be pressed to your Honor prior to the Hughes deposition.

I think that materiality is evidence, your Honor, from the fact that I hold in my hand documentary proof from the Bank of America files of statements made by Mr. Hughes himself in 1960 and statements made by Mr. Noah Dietrich in 1960 specifically pointing out that the 102 tax problems had always been and were at the heart of the Hughes problem, and I propose to establish on the record to date, and certainly so out of Hughes' mouth when he is deposed, that because of the tax problems of Hughes Tool Company and Mr. Hughes personally they engaged in the course of conduct alleged in our complaint and that that course of conduct undeniably violates the antitrust laws and was not and could not be exempted or dealt with by the CAB.

So I would like to have these papers in connection with his motion as well as in connection with the deposition.

Thank you, your Honor.

The Court: Mr. Chandler?

[24814] Mr. Chandler: I have nothing to add to the statements of Mr. Sonnett, your Honor.

The Court: Mr. Stewart?

Mr. Stewart: I join very heartily in the statements that Judge Bromley and Mr. Sonnett made.

The Court: All right.

Mr. Davis: May I reply?

The Court: Surely.

Mr. Davis: If your Honor please, I don't know about the facts referred to in Mr. Sonett's affidavit. I do have a recollection about some arrangements that some work papers were to be kept by Mr. Cook pending some determination of confidentiality. As far as I know, they were all produced, but I don't know what the facts are in that regard.

What I would like to address myself to primarily, however, is to the assumptions made by Judge Bromley in his

remarks that I am conceding that there was good cause or relevancy in the documents called for. That, of course, is not an accurate statement of my position. My position is at this point I am not prepared to address myself to [24815] that request or to that review of the special master's order. I simply have not had time to prepare in view of my efforts to work on the brief.

May I point out, first of all, how the additional defendants are affected by whether or not the Tool Company made a profit or did not make a profit or obtained some tax advantages reviewed by the Bureau of Internal Revenue with respect to its control or exercise of control of TWA, I just don't see how that establishes any relationship whatever to their defense.

In so far as plaintiff TWA is concerned, Mr. Sonnett just said that this will indicate to give an explanation as to why Mr. Hughes engaged in the course of conduct allegedly in violation of the antitrust laws.

I respectfully submit, your Honor, we are not concerned as to why someone violated the antitrust laws; we are concerned with whether they were violated, and I respectfully submit that whether or not the Tool Company did or did not make a profit in transactions which were reviewed and approved by the CAB and whether or not the purpose or objection or reasons why the Tool Company acquired 78 per cent [24816] control of TWA was because it would put it in a position where it could employ its cash and thereby avoid whatever is to be avoided against an improper accumulation of cash, and whether or not that was done by buying more securities of TWA or by providing funds for the acquisition of aircraft by TWA, I just don't understand how that can be said to be seriously documents that they have to have for the purpose of establishing

either that the Tool Company or Mr. Hughes engaged in a violation of the antitrust laws or how they could conceivably afford a defense to any of the counterclaims.

It is respectfully submitted at this point, however, that I am expressing this as what seems to me to be a rational reaction to the statement that I have heard, and I respectfully request the Court for an opportunity to address more fully on that question.

The Court: You have had this problem for a long, long time. I don't think you need any more time to present your point of view on this.

There is nothing new; it has been hanging around for several weeks.

Mr. Davis: What has been hanging around [24817] for several weeks, your Honor?

The Court: This production of the documents. What was the date of your affidavit before the special master?

Mr. Davis: The special master's ruling——

The Court: You prepared yourself to oppose the ruling of the master, you must have prepared yourself for this too. What is the date of the Hupper affidavit?

Mr. Bromley: January 9th.

The Court: Today is January 28th.

Mr. Davis: That is correct, your Honor, and I can assure you that between January 9th and now I have been on one matter or the other constantly in connection with this litigation.

I would also like to point out that I have lost two, almost three days of the time that was allotted to me by the Court in connection with the preparation of this material relating to this motion to dismiss. One of them was I received a request to attend a subcommittee of the Senate Judiciary Committee, it is called some Antimonopoly Committee, with

Senator Kefauver with reference to the Pan American-[24818] TWA merger and whether or not there was any pressure being applied on Mr. Hughes or the Tool Company in connection with this Pan-American-TWA merger. I have received two calls today from the Justice Department on the same question, and between times your Honor knows I have had to prepare papers and appear before the Court of Appeals——

The Court: This is your choice, not mine.

Mr. Davis: I understand that, but nevertheless I don't believe the circumstances here present indicate that the Hughes Tool Company is not entitled to whatever efforts it is entitled to make in order to protect what it believes to be its rights. I don't think there can be any question that if, in fact, as we claim we are going to be able to satisfy your Honor shortly, this complaint lacks merit and is a matter which is not properly before this Court but should be properly before the CAB, I respectfully submit that there is a grave injustice being done by requiring the Tool Company to do any more than it already has done.

The Court: You already have boxes of this stuff that you have gone through. Turn it over.

[24819], Mr. Davis: That is what happens when we get the facts piecemeal. That is not compliance with the schedule that Mr. Hupper has stated. That was compliance with your Honor's order as construed by the special master with respect to what we in fact did produce on March 15th and April 15th of last year.

The Court: You have it, haven't you, and it has been gone through?

Mr. Davis: They have been made available, your Honor.

The Court: These three boxes, I understand, have not been made available.

Mr. Davis: Your Honor, all I know is that Mr. Cook assumed the responsibility with respect to that production. The special master required that somebody be done, and it was done. There was a ruling with respect to treating it with confidentiality.

If what we are talking about is this affidavit by Mr. Hupper, I frankly do not know what is in this affidavit, and I am not in a position to either analyze what is in those boxes, if there are any such boxes——

[24820] The Court: Mr. Cook is, though, isn't he?

Mr. Davis: Mr. Cook has been engaged as I have been——

The Court: Let us get one thing straight. Has the material in the three boxes been turned over to parties in this litigation?

Mr. Davis: Have they been?

The Court: Yes.

Mr. Davis: I haven't the slightest idea.

The Court: Why don't you ask Mr. Cook tonight. If they haven't, turn them over.

Mr. Davis: I will do that.

Mr. Bromley: Of course not. They have been refused.

The Court: He has had them for a long time.

Mr. Davis: Your Honor, I cannot say any more sincerely than I have already said that it seems to me—and I believe I have authority to support it, if I had time to present it to your Honor—that there is a serious motion to dismiss this complaint.

[24821] The Court: You have argued that before the Court of Appeals.

Mr. Davis: No, your Honor. The only thing I have argued before the Court of Appeals was whether or not the order of this Court with respect to privileged documents was appealable and therefore reviewable.

The Court: I read what you said before the Court of Appeals. You went beyond that narrow point, Mr. Davis.

Mr. Davis: Now, your Honor, if your Honor has the record of the argument before the Court of Appeals and the notice of appeal that was filed, you are fully informed as to what took place there. All I can say, your Honor, is that it was one order which covered the production of the privileged documents and referred to other material. In order to obtain a stay from the Court of Appeals it was necessary for me to have an appealable order and my understanding of what the Court of Appeals did was to refuse to recognize that the order requiring the production of documents was appealable and thereby denied me a stay and did not consider my [24822] writ of prohibition——

The Court: Did not.

Mr. Davis: Did not.

The Court: I think Judge Lumbard directed you to argue all three items before him. It says so in the record.

Mr. Davis: If your Honor please, it turned out to be that I was denied leave to file it. That is what the order of the court was.

Mr. Sonnett: It was on our cross motion which was before the court.

Mr. Davis: I came back from Washington your Honor, on Tuesday, late Tuesday afternoon, having spent the day with this Kefauver committee, which, like everybody else, takes the position, an independent branch of the government—I tried to tell them I was busy in a court proceeding—that it is none of their concern, and found myself in the Court of Appeals the next day; and I respectfully submit to your Honor that I did not argue my writ of prohibition and that all that has happened so far has been that the order of this Court with respect to privileged docu-

ments was held to be nonreviewable, and I am prepared to follow whatever [24823] procedure is the appropriate procedure to follow in order to obtain what may be a reviewable order.

The Court: Well, I come back. It appears that Mr. Cook has two or three file boxes of work papers supporting the financial statements sent to the special master which had been held pending determination of their confidentiality, which means they have been reviewed and you know what is in them, and they have been there since March of 1962.

Mr. Davis: I will be perfectly happy, your Honor, to get what the facts are and submit them to your Honor. I am just not in a position to give you the information that you are asking me for.

The Court: Call me tomorrow morning and let me know.

Mr. Davis: I did not hear what your Honor said.

The Court: Call me tomorrow morning after you have spoken to Mr. Cook. At your suggestion Mr. Cook has them, according to this transcript before the special master, if Mr. Sonnett has correctly reproduced the transcript.

Mr. Davis: I will undertake to give the facts to your Honor tomorrow morning.

[24824] The Court: But I can't see any reason for any more time to argue why these things should not be submitted. You have had that same problem with even a greater degree in the attorney-client privilege asserted by you.

Secondly, I haven't heard anything about the question of, assuming that the complaint is dismissed, which is what your goal is now, the six counterclaims that are still pending in this court asserted by you against the plaintiff and the additional defendants.

In regard to the plaintiff, the plaintiff has moved to withdraw its motion to dismiss the counterclaims, and the additional defendants have filed their answers to those counterclaims, and Mr. Hughes is being deposed on those as well as upon the complaint, so I can't see why this material can't be furnished.

And let me hear from you, Mr. Sonnett, on your motion to withdraw your motion to dismiss the counterclaims.

Mr. Sonnett: Yes, your Honor. Before coming to that, and in order that the record be perfectly clear, may I call to your Honor's attention [24825] pages 18 and 19 of the transcript of January 23rd before the special master, because there, as again I believe here, what Mr. Davis was contending was that he had received information from Mr. Cook, because obviously Mr. Cook is the source of all Mr. Davis' information on the matter of these documents.

At the top of page 19 of that transcript what Mr. Davis said, which I think he has again said here, is that it would take weeks to try to gather all of the material called for if the Tool Company were in fact properly required to produce such material.

I am confident, your Honor, that on the basis of the 50 years that Andrews, Kurth has represented the Tool Company and the over 10 years that Mr. Cook has been in intimate contact with their financial and other matters that firm is quite capable of producing within 48 hours 90 per cent of the material called for by this motion, including the three boxes of work papers in connection with financial statements that were segregated a year ago.

It seems to me that they therefore should be required to produce that which is now available and to continue producing until some date [24826] prior to the Hughes deposi-

tion and complete it so that we have the opportunity of looking at the documents.

Mr. Davis' problems about understanding the relevance of the tax aspects of this can be set at rest if he would only read the statements that Mr. Howard Hughes made to the Bank of America in December of 1960 because Mr. Hughes understood the relevance very clearly of his tax problems and the course of conduct which he followed with respect to TWA.

The Court: What about your motion to withdraw your motion to dismiss the counterclaim?

Mr. Sonnett: Yes, your Honor.

We served our motion on January 25th, your Honor. As my affidavit indicates——

The Court: I wish you had done it a couple of weeks before. I have wasted a lot of time.

Mr. Sonnett: I can only suggest to your Honor the question of Pandora's box, or the lady and the tiger, and perhaps only your Honor would be the one to know, but I do regret that it wasn't done sooner. My only excuse for that is that I know [24827] how much the Court has to do anyway on this and other cases, and that is that when I was advised, as I was, that the additional defendants had seen fit to answer these counterclaims and took the position, as I did, that that was a matter for them and not for TWA, in view of the fact that they were going to answer the counterclaims, it seemed to me that the procedural morass that would then result was one that TWA should try to avoid and, in the interest of trying to avoid that, it seemed to me I should ask your Honor's leave to withdraw the motion to the extent indicated in our motion papers, namely, to the extent that we seek now to keep the motion alive, in effect, only with respect to a portion of counterclaim 2, that

is to say, a portion of our attack on counterclaim 2, and with respect to paragraph 6——

The Court: You mean it doesn't state a claim under 408; is that the part you are keeping alive?

Mr. Sonnett: Yes, your Honor. It fails to state a cause of action.

In so far as we pressed on your Honor a highly technical and complicated set of motions [24828] addressed to the point that the counterclaims were not proper under Rule 13, in light of the present posture of the case, and the fact that the additional defendants have answered, it seems to me TWA's interests are best served by our withdrawing the motion to that extent and asking your Honor for leave to reply to the counterclaims when we have examined Mr. Hughes.

On that point the derivative nature of the counterclaims, assertedly derivative nature of the counterclaims that would be left in the case, I think, make it particularly appropriate if we give Mr. Hughes a chance to tell us what he knows, not only about the allegations of the complaint, which I take the stand denied, regardless of this motion, but as well as the allegations in the counterclaim which, so far as TWA knows to date, are not true.

That is our position, your Honor.

The Court: Mr. Davis.

Mr. Davis: Your Honor, the reason given by Mr. Sonnett for withdrawing his motion on the counterclaims is indeed fascinating because the reason that the additional defendants did not answer [24829] the counterclaims was, when they argued before the special master that they should not be required to answer the counterclaims by reason of the motion to dismiss which was pending, the special master over my objection granted the request of the additional

defendants to delay answering the counterclaims while the motion to dismiss was pending; and now, if I understand Mr. Sonnett correctly, upon hearing that the defendants were ready to answer the counterclaims, he withdraws his motion.

I appreciate, your Honor, I haven't had time to really think about what this maneuver really means, because at the same time I understand that counsel for the additional defendants is bringing on a motion returnable the 18th of February to dismiss the counterclaims with prejudice as punishment for alleged contempt by reason of the fact that I have withheld these privileged documents.

What it appears to be, your Honor—and this is a matter of extreme seriousness, and unfortunately it involves matters which are not before the Court relating to this Pan American-TWA merger—but what this means, your Honor, is a development [24830] of a sacrosanct——

The Court: Thank you.

Mr. Davis: —date, February 11th.

Now, what is it about February 11th, or any other date in the neighborhood of February 11th, which is of such vital importance to this plaintiff or these defendants where even our effort to have a most serious motion to dismiss considered by the Court, nothing should interfere with the date of February 11th? That became——

The Court: Let me ask you a question, Mr. Davis. If the date was April 11th, could I have had your motion to dismiss the complaint for summary judgment?

Mr. Davis: Yes, your Honor.

The Court: I would have?

Mr. Davis: Your Honor, let me put it this way. That motion was made, as I believe the rules require, upon the basis of the complaint. My Rule 11 motion was——

The Court: If you had noticed it for argument and if I had fixed the date of Mr. Hughes' deposition for April 11th——

Mr. Davis: Of '63?

[24831] The Court: —and adjourned the master's fixing of the date of February 11th?

Mr. Davis: Your Honor, whether I was right or wrong on this, let me at least explain to you what I was doing, and this is basically a problem which I think is an interesting one from the point of view of the rules.

We have the concept that a complaint does not have to be as explicit as it used to be in some pleadings. Therefore, we then approach it next that a plaintiff who has seriously brought on a claim—I would not say in this case the plaintiff is represented by counsel who is inept at drafting pleadings, but in other cases it may be—I understand some of the rulings of the Court of Appeals to be that courts lean over backwards in giving a plaintiff opportunity to adequately explain or demonstrate what it is he is complaining about.

The Court: Pardon me, Mr. Davis. I have just one question to ask you, and I think the answer can be a simple one.

If on January 10th I had adjourned the deposition of Mr. Hughes from February 11th to April [24832] 11th, and if I had acceded to your request that you proceed with the deposition of Ben-Fleming Sessel and Mr. Wadsworth, do you tell me that I still would have received a notice of motion from you dated January 14th to dismiss the complaint for summary judgment?

Mr. Davis: Your Honor, the answer is yes to your Honor, but let me say there is only one thing that I don't want to be misunderstood on, and that is what I was waiting for was not a decision about Ben-Fleming Sessel or Wad-

sworth; the only thing that might have delayed my bringing on the motion to dismiss until January 14th was or would have been the ruling with respect to the answer to interrogatories under Rule 16.

Had your Honor on January 9th granted the application for a Rule 16 proceeding that we made, referring to the special master or to the Court, or had your Honor required the interrogatories to be answered, then there is no question in my mind that I would have withheld the making of the motion, because then I would have made a motion both under Rules 11 and 56.

Now let me say one other thing, your [24833] Honor. At the present time the motion, the papers that I will file with you on February 1, by noon, in whatever condition they may be——

The Court: They will be in good condition, I am sure.

Mr. Davis: Not in the condition they should be in, your Honor.

I will call your Honor's attention that as a practical matter I am forced to abandon my Rule 56 motion and I have to proceed solely on the Rule 12 motion.

The other impetus which permits me to tell your Honor, with no question whatever in my mind that such a motion had been made, was a decision of the Supreme Court in the Panagra case.

The Court: You did not even know about it when you filed the papers with me.

Mr. Davis: Your Honor, I had been relying on the Panagra case for some time. To be sure, both sides had been using it.

The Court: You did not know when the Panagra case was coming down, and your papers were prepared before it came down.

Mr. Davis: The minute your Honor [24834] indicated to me that your Honor had decided not to give me a Rule 16 proceeding and no answers to interrogatories, at that point, so far as I was concerned, there was going to be no further opportunity to elicit from the plaintiff what the basis is for this complaint, what is the course of conduct on which they are relying, and at that point I had no more any reason whatsoever but to test the theory which I had adhered to from the time this complaint was filed, that this complaint and the subject matter of this complaint was improperly in this court.

However, I naturally, so long as the Court would permit me to adduce from the plaintiff what is (sic) is that the plaintiff was claiming—now, the notice for taking the deposition of Mr. Sessel, which had been made at the time the complaint was filed and which was covered by the earlier orders of the courts, your Honor—and, as I explained to the special master, I was treading water, your Honor, from October of 1962, until your order of January 9th, proceeding with taking oral depositions in the face of what the special master said on the record repeatedly, that there was no question that I was not [24835] going to be able to find out the facts I was seeking because TWA quite candidly said, "We don't know the facts." The facts are in the knowledge of counsel who investigated the facts and there is only one way to get at that and that is by interrogatories.

I could have examined every officer of TWA and know no more than I know today. I could have called your Honor's attention to Mr. Rummel's testimony, to Mr. Cocke's testimony, to Mr. Tillinghast's testimony. None of them know of any course of conduct violating antitrust laws. They say this complaint is because of what counsel recommended

because of their investigation. They asserted the work-product and attorney-client privilege, and here I am.

The minute your Honor denied me the answers to interrogatories until after we were examined—and there is no question that for the Tool Company to proceed with these depositions in Los Angeles will involve the expenditures of vast sums of money. Now, that has nothing to do with respect to the availability or lack of availability of Mr. Hughes and, so far as I am concerned, your Honor, I would have brought on that motion to [24836] dismiss, as I was prepared to argue that motion to dismiss shortly after it had been referred to your Honor for all purposes——

The Court: Except you acquiesced that it wasn't timely to bring on.

Mr. Davis: Your Honor, I always recognized, and I am prepared to recognize at this date, that I am prepared and I am so confident of my facts that I am prepared to let this plaintiff, any time he wants to, present whatever facts he wants; not for the purpose of raising an issue of fact, I will admit every fact he asserts and ask for a decision on the law, I will admit every answer he gives me on interrogatories.

It seems to me I should have an opportunity to do that. An issue of fact is raised, your Honor, only if I were to deny anything, if I were to deny what they say, but I need a statement under oath, I don't need a statement under oath by any officer of TWA claiming to have knowledge of the facts and I admit them. They can use those facts either for the purpose of construing the complaint or anything else they please, and I ask for a determination of the case on the law, and if I am wrong on [24837] that, your

Honor, I will make a commitment. Then we proceed to the assessment of damages.

Mr. Sonnett: What Mr. Davis just said—or else I am having trouble with my hearing—it is like someone once said, "Listening to him is like trying to nail a custard pie to a wall," but if he said that he admits the allegations of the complaint, TWA now moves for judgment on his admissions and for the relief sought in the complaint.

The Court: I don't think he said that.

Mr. Sonnett: I am not sure. I never know exactly what he is saying except that he wants to use the Federal Rules for himself, the Tool Company, but he doesn't want anybody else to use them.

The Court: All right. That takes care of three matters I have here.

Review the rulings of the special master regarding the production of the tax documents: I will give you until tomorrow to tell me about those three boxes of papers, Mr. Davis, and I will then decide the matter. I see no necessity for additional time for additional argument on the question of the counterclaims.

I assume everybody has finished talking [24838] about TWA's motion to withdraw the motion to dismiss the counterclaims. That motion is granted with leave to TWA to file their answer 10 days after the conclusion of the deposition of Howard Hughes.

I have an application here which I received at 2:30 this afternoon, and I assume other counsel have received it, from an attorney for Mr. Tillinghast——

Mr. Davis: I don't believe I have that, your Honor.

The Court: You don't have it?

Mr. Harrell: Mr. Davis, your office was served with it Friday evening.

The Court: —to answer the counterclaims within 10 days after the conclusion of the deposition of Howard R. Hughes.

Do you want to say anything in opposition to that, Mr. Davis?

Mr. Davis: No, your Honor. I suppose it is the same thing that TWA is doing.

The Court: Yes, the same disposition on that.

I have one other thing here, a question I wanted to ask you, Mr. Davis. [24839] You wrote me a letter January 23rd which has been made part of the record before the special master. I will just refer to the last three lines of the second sentence in that letter, which read:

> "I must respectfully decline to comply with your said orders, at least prior to a determination of this motion to dismiss now pending before your Honor."

The question I want to ask you about those three lines is: did you make this decision on your own, or did you discuss this with your client?

Mr. Davis: I discussed it with my client, your Honor.

The Court: All right. That is all.

Mr. Stewart: If your Honor please, one other item.

Additional defendant Dillon Read has not as yet answered the counterclaim, and under the prior state of the record had until 30 days after your Honor's decision on the motion of TWA to dismiss the counterclaim.

May I at this time apply for 30 days in which to formulate our reply to the counterclaims? [24840] Since the mo

tion is now withdrawn, there will therefore be no decision, presumably, and we would like to have this additional time to prepare a reply.

The Court: I don't think you can have 30 days. I certainly think your answer ought to be in by February 11th, the date of the deposition.

Mr. Stewart: That would be perfectly satisfactory. That is fine.

The Court: All right.

[24842]

Pretrial Hearing, February 6, 1963

[CAPTION]

BEFORE:

HON. CHARLES M. MI NER
District Judge

[APPEARANCES:]

* * *

[24843] The Court: Before we commence arguing on motions, does anybody have a copy of the CAB order of December 29, 1960? That was not public, as far as I could find.

Mr. Davis: We could have it before the close of the argument.

The Court: Secondly, Mr. Sonnett, your brief, on page 40 you refer to intermediate orders of the CAB in this matter. Do you have copies of those?

Mr. Sonnett: I do not, your Honor, have them with me but I can get them readily, I think.

The Court: Would they indicate what the Board was asked to do aside from just a three or four-line alternate finding?

Mr. Sonnett: I can't answer that question until I have another look at that.

The Court: All right.

[24844] Mr. Davis, you may proceed.

Mr. Davis: May it please the Court, I would like to say preliminarily that I put my energies in the paper that

we prepared for submission to the Court and I am a little hoarse and hard of hearing today.

I would like, if I may, to reserve as much of the time that the Court would be inclined to allow me to reply to whatever argument counsel for TWA may present, because I believe that our position is adequately set forth in our memorandum and reply memorandum.

In that connection, your Honor, I am not personally aware of when that reply memorandum was in fact delivered to your Honor's chambers.

The Court: Before lunch.

Mr. Davis: May I assume that you are familiar with the contents of that memorandum?

The Court: It was read in detail. Luckily I did not have to hold court this afternoon because I had to review some 3500 material and grand jury minutes for the grand jury tomorrow morning. I spent all afternoon on your reply brief.

Mr. Davis: Then apart from answering [24845] whatever questions I may be able to answer, I can state my position very briefly.

I want to emphasize first of all that we are not bringing on the motion for summary judgment under Rule 56. We have withdrawn that motion for the reasons stated in our memorandum. I can expand those reasons, if they would be a matter of interest.

The Court: No, I don't think it is necessary. I disagree with the reason you give or the indication you are compelled to withdraw your motion.

Mr. Davis: Then I would like to emphasize that so far as the motion we are bringing on is concerned, we are relying solely on the allegations of the complaint; we are not going outside of it.

Pretrial Hearing, February 6, 1963

In the introductory statement of our memorandum in connection with the explanation I attempted to set forth reasons why we wanted to withdraw our motion for summary judgment. I did refer to the testimony of Mr. Tillinghast and other officers, and the comment of the special master with respect to that testimony but only for the purpose of explaining the [24846] posture that the Tool Company found itself in.

The Court: I think you have a problem we can overcome simply. I am going to decide this as a motion for judgment on the pleadings in so far as that particular claim of yours is concerned.

You are in a procedural dilemma. You are withdrawing the motion for summary judgment, and yet you have gone outside the face of the complaint, and necessarily so, because the face of the complaint does not mention the orders and exemptions which you rely on as your third affirmative defense. Consequently since you have answered and raised that issue by your third affirmative defense I will consider this as a motion for judgment on the pleadings to get over whatever procedural hurdle you would have in arriving at your first determination for the first grounds of dismissal.

Mr. Davis: May I state in that connection——

The Court: Under the Putnam case the complaint would withstand a motion to dismiss under 12(b)(6). We will get to the merits of your ground without being held up by any procedural problem.

[24847] Mr. Davis: May I merely state then that my position with respect to referring to the CAB orders, I did not refer to all of the many CAB orders which approve particular transactions between the Tool Company and

TWA because my position is that it is immaterial whether they were in fact in violation. If not, we were in violation of CAB orders; and if they were, we were not.

I refer to the orders issued by CAB under 408, because to my mind those are quasi-judicial decisions which under the law, as I understand it as reflected by the decision of the Supreme Court in Panagra, it is a matter which needs to be considered as a matter of law, the legal effect of those particular orders of the CAB.

Having made those observations, your Honor, I believe that I can only address myself to answering questions, answering the position taken by TWA. I can anticipate to some extent, I think, in my reply memorandum I have adequately made clear that there is no basis for the distinction between the conduct alleged in 1961 and that alleged prior to 1961, so far as the contention is that such conduct was in violation of the antitrust laws. I can [24848] expand on that, although my reply memorandum, it seems to me, adequately takes care of that contention.

I think I would just be taking up the Court's time unnecessarily if I repeated what I set forth in my memorandum, reply memorandum.

The Court: Mr. Sonnett.

Mr. Sonnett: TWA submits on the papers before your Honor, unless there is some question you have of me.

The Court: I have no question.

I received Mr. Davis' reply at noon last Friday. I received your brief at noon last Saturday, and I worked Friday night, Saturday, Sunday, Monday night and last night, and I called for this hearing on the chance that maybe Mr. Davis could persuade me that the conclusion I had reached on reading the briefs and studying them and

checking the law was wrong. Mr. Davis wants me to rely on his papers. Consequently I will deny the motion to dismiss the complaint. This is the order of the Court and a formal opinion will follow in the next day or two.

Mr. Davis: Your Honor, may I respectfully [24849] request then that in your opinion you certify the matter, 1292, so that I may obtain a discretionary review by the Court of Appeals?

The Court: The application is denied.

Mr. Davis: May I respectfully request your Honor to stay all further discovery proceedings by the plaintiff until I have had an opportunity to seek a discretionary review by the Court of Appeals?

The Court: Are you referring to the production of the documents under my pretrial order of January 19th or the tax papers covered by the orders of February 1st, or the deposition of Mr. Hughes, now scheduled for February 11th?

Mr. Davis: I was referring to all further pretrial proceedings, your Honor, because of the unquestioned burden and expense that the Tool Company will withstand if we are to continue to litigate with a view toward having a trial prior to our effort to obtain a review as to whether the determination made today on our motion to dismiss is not upheld.

It seems to me it is difficult, although I would be willing to cooperate if it would be helpful in any way, to separate how far to go and [24850] where to stop.

The desire of the Tool Company is to seek an early and expeditious disposition of this litigation, particularly since it is bearing 78 per cent of the cost of this prosecution. Therefore it would be extremely burdensome, assuming

that the Court of Appeals will review the basis for our motion to dismiss, upon the Tool Company to be incurring those very substantial expenses pending a review of that question by the Court of Appeals.

It seems to me, your Honor, that there is at least a very substantial question raised by the decision of the Supreme Court in the Panagra case as to whether or not this court should entertain jurisdiction of the questions raised by this complaint.

Granted that this decision in the Panagra case in some respects, as the dissenting opinion indicates, digressed from a prior determination of the Supreme Court and therefore to that extent may be regarded as a new and important question, but I find it difficult to conclude that the Court should not consider the fact that there is a very serious question involved, a question of law.

[34851] The Court: I will tell you what I will do. I will grant your application to the extent of staying all further discovery or deposition proceedings until 5 o'clock Friday. That will give you two days to make whatever application you wish to make to the Court of Appeals for a stay.

Mr. Davis: All right, your Honor.

The Court: Today is Wednesday, and you have tomorrow and Friday to draw your papers up and go to the Court of Appeals and ask for a stay. My stay will expire at 5 o'clock Friday, February 8th.

I have been bombarded with briefs, memoranda, motion papers and letters, and I have difficulty keeping abreast of them all. Let me see if I can find what I am looking for.

Mr. Davis: Is your Honor referring to this notice of motion that we made?

The Court: I am referring to a letter that you wrote to Judge Hall.

Mr. Davis: I wrote two. One was in response to a letter from Mr. Rankin to Judge Hall.

The Court: The earlier one you sent to Judge Hall without sending copies to the special [24852] master, who is counsel to the Court.

Mr. Davis: I received information that there had been communications with Judge Hall of which I did not receive a copy. I did not know what they were. The only information I received, I think, was at the time Mr. Sonnett filed with your Honor a memorandum indicating some representative had communicated with Judge Hall.

I never received a copy of any communication by anyone contacting Judge Hall until I received a copy of a letter by Mr. Rankin. Mr. Rankin has indicated that he would contact Judge Hall, and I was waiting for him to do so in order to address myself to that question. Then, as I recall it, I received a copy of a communication by Mr. Sonnett to your Honor indicating that someone in California had contacted Judge Hall and the United States marshal out there. That is what, as I recall, produced my first letter. Shortly thereafter, as I recall it, I received a copy of a letter from Mr. Rankin to Judge Hall and I addressed myself to that letter.

The Court: I can't find it offhand with all these papers that have come in in the last [24853] two weeks.

What I was looking for that letter for was an indication that you had made in that letter, as I recall it, that until the Court had ruled upon your motion to dismiss you saw no reason why arrangements should not be made—or why ar-

rangements should be made for the deposition of Mr. Hughes on February 11th.

In your letter of February 4th to the special master, a copy of which was furnished to me on February 5th by Mr. Hupper, of counsel to the insurance companies, the additional defendants in this case, you stated as follows:

> "As I explained to you in our telephone conversation, Toolco is taking the action indicated above without prejudice to its position that at this time it may not be properly subjected to further discovery proceedings by plaintiff or the additional defendants. Rather than submit to further discovery on the record to date Toolco reserves the right, if it becomes necessary to do so, to elect not to defend on the merits.
>
> "It is, of course, the expectation of Toolco [24854] that the disposition of its pending motion to dismiss will obviate the necessity of pursuing the matter further.
>
> "In addition, in connection with the claims being asserted by Toolco against the additional defendants, you are referred to the motion of the additional defendants, returnable February 18, for an order dismissing said claims with prejudice and to the letter of Toolco to Judge Metzner and dated February 1, 1963."

My reference to your letter to Judge Hall and to this communication is in the light of the ruling which I now have made regarding the sufficiency of a complaint and its validity against the attack you have made upon it.

I think, if I read the implications of your letter correctly, that if the Court's determination is final you would not proceed with the deposition in California on February 11th. If that is true, I think that it would be better for all people concerned, considering all the time and effort necessary to move the proceedings to Los Angeles, to indicate that as quickly as possible, so that arrangements which are now in progress are not carried forward at [24855] great expense to yourself, to the plaintiff, to the additional defendants, and the inconvenience to the court in Los Angeles which, as I understand it, is proceeding to make the necessary arrangements for this hearing to go forward on February 11th. This is a suggestion which I am making.

Mr. Davis: Your Honor, I am quite aware of that. I do intend and hope, perhaps tomorrow, that I will be in a position of advising all concerned, and particularly Mr. Rankin, to whom I have already pointed out the possibility, and I did expect that I would get some guidance as to what I will have to do next based upon today's ruling or observation that your Honor might make.

I will so advise the parties and try to work out an appropriate procedure so as to put the position of the Tool Company on the record.

Your Honor, I am wondering if it would be appropriate for me to make another suggestion or request, if I may.

In connection with the denial of our motion to dismiss and the time which I now have to apply to the Court of Appeals for whatever relief I can have, and more particularly in view of what I [24856] understand by your Honor's ruling denying the certification under 1292—I also understood that the reasons or the opinion of the Court in reaching that conclusion will not be available to me for

another day or two—I was wondering what I would have to present to the Court of Appeals as the basis of the Court's ruling on the one hand and my position on the other.

The Court: It is complicated. I must formalize my ruling and give you the reasons for it. But the two grounds which you are urging are fairly simple grounds.

I think you have set forth in your brief and in your reply brief—and I must say better in your reply brief than in your original brief—your position. I would assume that if you do not have a copy of my opinion by noon on Friday—and I will make every effort to see that you get it; I will have my secretary down tonight and tomororw night to get it out—even absent the formal reasons, the answer is I do not agree with you.

Mr. Davis: I know I can say that to the Court of Appeals, but in order——

The Court: I will make every effort to [24857] have it before you—it is not going to be too long and will probably run about 15 pages—but I think if you were to go to the Court of Appeals and, if it is necessary, say to them, "Judge Metzner disagreed with this position that I took on my briefs," it would suffice, because all I had before me were the briefs. I ruled upon the briefs and the complaint.

Mr. Davis: That is correct, your Honor. But obviously, and particularly in view of your ruling refusing certification of 1292, I was thinking that the Court of Appeals might like to know what the legal issue— —

The Court: I think I flatly can say that I disagree with your interpretation of 408 and 414 as applicable to the specific orders involved here upon which you rely, the orders of 1944 and 1950. The scope of the order goes to the fact of acquisition, as I see it. It does not give you a license to engage in subsequent acts which may amount to restraint

of trade or attempts to monopolize, and I do not think the words in 414 are necessary to carry out what was authorized or approved by the Board encompassing such activity. That in [24858] brief is what the 15 pages are going to say.

Mr. Davis: Do I also understand that it is the conclusion of the Court that——

The Court: Let us leave it this way. You will have an opinion signed by 10 o'clock Friday morning.

Mr. Davis: Thank you, your Honor. I would prefer a stay for a couple of more days.

The Court: I can go on, but you may say what I said from the bench is not what I put in the opinion. I will go over the draft and polish it up.

Mr. Davis: I was really hoping for a little more time beyond Friday.

The Court: I am afraid not.

Mr. Hupper: Your Honor, if I may indulge the Court for a minute, my name is John Hupper and I appear here in the absence of Mr. Bromley, who unavoidably is out West today. I won't say exactly where.

I speak in connection with a paper that was served upon us around noon today involving an application for a stay of any further proceedings in this case on behalf of the additional defendants [24859] on the counterclaim by reason of a so-called complaint which has been filed today with the CAB. If I may say so, and I think I speak for all the additional defendants, our plans for California are well advanced. Many of our files are there and some of our people.

We believe it is very important to have a quick disposition of this application for a stay, which, as we view it, is simply another diversionary effort in some manner or other to avoid the deposition of Mr. Hughes.

Mr. Davis, in his notice, states that he is bringing on this motion on February 8th, or such other time as the Court may direct. We respectfully urge your Honor to hear Mr. Davis on this motion now so that we will know where we stand at the earliest possible moment.

The Court: I can listen to him. Does that mean I have to decide it too?

Mr. Hupper: We believe this motion to be just a——

The Court: I have read the complaint which Mr. Davis served upon you. He filed a copy with the Court. I read it this afternoon.

[24860] Would you say, Mr. Davis, in view of the determination of your motion on the complaint, that this motion which you served today, returnable at 4 o'clock Friday, need not be heard at 4 o'clock on Friday?

Mr. Davis: Need not be heard, your Honor?

Well, your Honor, it may very well be that the reasoning that the Court will give in its opinion will cover this also. However, based only upon what your Honor has indicated today, which, if I understand the remarks which obviously——

The Court: Which you are not going to hold against me.

Mr. Davis: Which I won't hold against anyone—indicate the views of the Court as to whether or not the orders obtained from the CAB covered the course of conduct alleged in the complaint.

We have, as your Honor is aware, a second independent ground on which we claim that this primary jurisdiction is in CAB based upon a Supreme Court decision in Panagra, and that is whether the CAB had the the power to approve.

To the extent to which your Honor, in [24861] denying my motion to dismiss, addressed himself also to that ques-

tion—and I recognize that inferentially, but I would like to have it for the record—you would be denying the basis upon which I claim that I would be precluded from pursuing the counterclaim in this court on the ground——

The Court: You wrote to me, as I recall, several days ago—and I think I have those papers right here; your letter of February 1st, that was last Friday—in which you gave me the impression that the reason you were going to move before the CAB and for a stay in this court with regard to the counterclaim was that, if the motion to dismiss had been granted, there would still be outstanding the counterclaims upon which the plaintiff and the additional defendants could proceed with depositions and, since you felt that those counterclaims dealt with the primary jurisdiction of the Board, if they were the only things left in the lawsuit at this time you were then going to move, with regard to the counterclaims, to remove them from the case and remove them as a possible basis for the deposition of Mr. Hughes on February 11th.

In view of the fact, however, that I [24862] have found that your motion to dismiss the complaint should be denied, I was wondering whether the reason for this last procedural step existed any longer.

Mr. Davis: It still exists to this extent. It is quite true that in my February 1st letter I was addressing myself to the situation which would exist if the complaint was dismissed and we had the counterclaims and what the basis of jurisdiction of the court was on the counterclaims absent the existence of the complaint.

Quite frankly I do not know the answer and I have not had an opportunity to research the question as to what is procedurally the question if you assume a complaint as being

validly before the Court and a counterclaim as to which primary jurisdiction rests in the Board.

Assume it is a compulsory counterclaim or not a compulsory one and then the question——

The Court: You think they are compulsory counterclaims, don't you?

Mr. Davis: Certainly some of them are.

The Court: Miss Lea argued that a year or so ago.

Mr. Davis: They are certainly com- [24863] pulsory permissive.

My problem, and the reason for the answer I am now giving you as to whether or not there is any question left, is that I believe there is a question left, although to be sure to the extent to which the Court is predicating denial of our motion to dismiss merely on the fact that 408 does not grant exemption of 414, that has nothing to do with the counterclaim because we do not claim that there were any 408 orders granting exemption of 414.

We do recognize, and our position has to be consistent, and is, we read the Panagra case, there is primary jurisdiction of CAB if the course of conduct alleged is one that the CAB could approve. Whether it did or not is besides the point. Whether it could approve under 408, that is the point.

Whatever the Court may do here, we are proceeding before the CAB for a determination by the CAB as to whether or not the course of conduct there involved—by "their involved" I mean the counterclaim—is something that they will find to be either in the public interest or not in the public interest.

Our view of the case, that is, the pre- [24864] requisite before we could recover anything in our counterclaim, if I

could rely on the ultimate conclusion of the Court that that is not so—and I have not even heard it today, but I assume your Honor will cover that aspect of the matter in your opinion—as I say, it may very well be that, as far as a need of argument or an extended argument or briefing on this question, it will be unnecessary in the light of whatever opinion the Court hands down in connection with the ruling made today, but so far as Toolco is concerned we most sincerely believe that the only proper interpretation is the Supreme Court direction in the Panagra case, because that was in fact the question before the court in the Panagra case, squarely before the court.

There was a situation where something had not been submitted to the CAB for approval. The CAB unquestionably had not issued any orders and the CAB had to act under 411, which was not involved in 414. Yet the Supreme Court dismissed the complaint because you must go to CAB first and let the CAB decide.

Presumably if the CAB—and I am talking about the Panagra situation now—were to [24865] decide that the manner in which Pan American and Grace were exercising control over Panagra was not in the public interest and they refused to bless it or sanction it or however it is done, then presumably whoever had an interest in the situation could resume litig ion in the court on the basis of violation of the antitrust laws.

That, of course, was the second independent ground upon which we predicated our motion to dismiss. We were not relying exclusively on the existence of 408 orders.

The Court: Obviously.

Mr. Davis: To answer th suggestion of your Honor, we do—of course, if the complaint is to continue to be litigated, we are not asking to be stayed in our counterclaims,

and that is something I will have to think through between now and Friday.

As far as our pursuing our procedure before the CAB, we do not think we have any choice on that.

The Court: Well, I don't know what I can do about your motion. You have noticed it at least for Friday at 4 o'clock. I am in the [24866] ninth week of this criminal trial so I am tied up from 10 until 5 every day, except this afternoon, when we had this lucky break.

If you want your decision out on your motion to dismiss to show the Court of Appeals what I said, it is physically impossible to take this up.

Mr. Davis: I appreciate that.

May I suggest that the matter be left in abeyance, but tomorrow I will make an effort to also make a decision and take whatever action I am advised to take—either tomorrow or Friday—but I will advise the parties with respect to this Los Angeles date so that——

The Court: May I take your motion and hold it in abeyance and have argument on it?

Mr. Davis: Any time convenient to your Honor.

The Court: Mr. Hupper is not satisfied.

Mr. Hupper: Isn't it perfectly plain what Mr. Davis is trying to do here? He is going to have a decision some time Friday from the Court [24867] of Appeals on whether or not there is any merit to his attempt to get appellate review. At that point he will have something else which he can wave in front of you or some other court which he will use as a basis for arguing that the deposition of Hughes should not go ahead on Monday. There are still unresolved questions——

The Court: Will you agree, Mr. Hupper, if the Court of Appeals stays my determination, that you are not going to run out to Los Angeles Monday?

Mr. Hupper: I would not agree to that as a matter of law for this reason: The charges made against us in this CAB proceeding are quite entirely different than the charges made by the TWA people against the Tool Company completely. We have an additional question here which is a matter of discretion.

We have, for over a year or almost a year now, been engaged in this case, brought in by Tpolco against our will, the Tool Company asserting claims of over $330 million against us and alleging that this court had jurisdiction over those counterclaims, and we have——

The Court: Mr. Davis said Panagra did [24867-A] not come down until——

Mr. Hupper: That is not applicable here at all. That involved Section 411.

The Court: I read it four times. Don't tell me that.

Mr. Hupper: It has not the slightest thing to do with this. We are not air carriers and we are not engaged in air transportation. It has nothing to do with this case. There is not a possible basis for it.

What Mr. Davis is doing here is using this motion as a basis after a year of dragging us down the garden path and making us spend hundreds of thousands as a last ditch attempt to stave off the deposition of Hughes.

We have a right to examine Mr. Hughes independently of whatever his position in that complaint is. As a matter of discretion we feel you ought to permit us to go forward on that examination if only for the fact that it would enable us perhaps to adduce facts which would be helpful to you in determining whether or not you have jurisdiction over the subject matter.

The Court: Mr. Davis, do you intend to [24868] pursue your counterclaims?

Mr. Davis: Not until we have a determination from the CAB.

The Court: In other words, you want to stay any proceedings regarding the counterclaims in this court until the CAB has spoken first?

Mr. Davis: That is our understanding of what the Supreme Court has held.

Of course, if I am told in some final manner that I am wrong in that regard, I want to be able to resume. That is our understanding of the Panagra case. It is a basis for our motion to dismiss. It will be the basis on which we will try to obtain a review at this time and therefore I don't understand why a defendant is so anxious to be prosecuted if I am willing to stay my claims against the additional defendants. So far as the facts in their petition, they are set forth in these proceedings before the CAB.

I fail to understand every time being accused of following some procedure for some improper motive. What is the motive of the additional defendants in feeling that they want to examine Mr. Hughes to defend themselves and I am permitted to [24869] keep their claim in abeyance, until the CAB can make a ruling? Perhaps Mr. Hupper can explain it more clearly.

The Court: We will have to take Mr. Stewart first. This is his chance to be not the last man.

Mr. Stewart: Mr. Davis, as far as the additional defendant Dillon Read is concerned, for the first time in this case, after having been in it for a year, we have the opportunity presumably to prove that the counterclaims which are brought against us are absolutely baseless. It

is particularly compelling because this co-called complaint which Mr. Davis has brought before the CAB is absolutely meaningless as far as we are concerned.

Dillon Read is not an air carrier; it is not engaged in a phase of aeronautics, nor does he claim that we are so engaged. Nothing that the CAB says or does not say can affect us in any way.

We have no interlocking directorates and nobody in Dillon Read is on the board of Pan American or TWA or the Metropolitan or the Equitable. There is no possible way in which we can come into Section 411, which deals with unfair competition among air [24870] carriers. Nothing that the CAB decides in this complaint can affect us in any way.

For the first time in this litigation we have come close to being able to prove there is nothing to the charges in his counterclaim, and I suggest it is absurd for him to want to stay on the counterclaims he brought, bringing us into this action, at this particular juncture. I ask your Honor to deny it from the bench.

The Court: There are other problems in the CAB proceeding, are there not, Mr. Davis? You allege that Pan American World Airways and Mr. Juan Trippe were also co-conspirators during this whole time with the additional defendants named in your counterclaim.

Mr. Davis: There is no question, your Honor. Subsequent to the filing of our counterclaims I discovered additional facts which I am bringing to the attention of the CAB.

There is no question, however, that the course of conduct involved, which is a matter of concern, primary concern, to the CAB, is the same whether or not the addi-

tional defendants are limited or expanded by one more or less. The question [24871] basically is whether or not the CAB—for all I know, although I don't believe so, the CAB may approve this interlocking relationship between Metropolitan and Pan American. That is where we get into the question of where I am disagreeing with your conclusions.

It is clear to me, as the Supreme Court said, we are in a peculiar situation if on the one hand the Court were to entertain whether or not a course of conduct was or was not in violation of the antitrust laws and then the CAB should turn around and approve it and specifically grant exemption under 414, even though they never did it before.

The Court: Is the issue of whether any of the parties named in the complaint before the CAB are engaged in a phase of aeronautics a question for the CAB or for the Court under the counterclaim?

Mr. Davis: We allege and claim that they are engaged in a phase of aeronautics. The CAB has any number of decisions as to what they claim is a phase of aeronautics. I believe it is a question for the CAB to determine, subject to judicial review by the Court of Appeals.

There is no question; the Act uses a [24872] phrase "a phase of aeronautics," and there again we come to the question as to how we construe the Supreme Court direction or mandate which said the Act must be construed broadly and must be intended to empower the Board to correct the evils inherent in whatever it deals with.

There is no question but by 409, interlocking directorate relationship, and there is no question under 408, the Congress intended that agency to control and regulate the relationship between a person engaged in "a phase of aeronau-

tics" and an air carrier and transactions between them and what they do to each other.

You emasculate 408 if some independent such as the Court is going to define what a phase of aeronautics is or is not. There is no question of judicial review as to what the Board may determine. I don't have any question in my mind. I may be in the minority here today, but it is at least the primary jurisdiction, the expertise of the CAB, to determine in the first instance what they regard as a phase of aeronautics.

I know that throughout the years since the Act was passed a great many people have argued [24873] before the CAB that the kind of activities they were engaged in were not the manufacture of aircraft or parts of aircraft and therefore outside of the control of the CAB, and therefore they could do what they wanted to do, and CAB has rejected those arguments on a number of occasions and has developed CAB law as to what they claim constitutes a phase of aeronautics. That is unquestionably involved here.

Go back to reasons why I did what I have done and how things change. There is no question in my mind that the Panagra decision of the Supreme Court expanded what I was contending for prior to the Panagra decision.

If your Honor will recall I was accepting the decision of Judge Murphy in the Panagra case where he had excluded from the jurisdiction of the Court that area which had been covered by orders of the CAB, leaving to the CAB to interpret its own orders as to whether or not it did cover the conduct that was alleged.

The Court: He only went ahead, as I understand it, on the charge that Pan American had prevented Panagra from applying for additional routes [24874] from the Canal Zone to the United States.

Mr. Davis: That's correct. Before Judge Murphy the contention—there were two aspects of the claim. One was that one which was predicated upon an agreement between Grace and Pan American entered into before the Civil Aeronautics Act was adopted and therefore protected by the grandfather concept, and there were alleged violations of the antitrust laws by reason of the fact that control had been exercised over the air carrier in the use of ticket offices and some other things which were subject to orders of the CAB.

In our earlier brief back in August of 1961, I think it was, I was arguing that Judge Murphy had recognized the primary jurisdiction of CAB, leaving to the CAB the interpretation of its own orders as to what it was approving or not approving, because the CAB had acted in that area but assumed jurisdiction in the area they had not acted and at that time believed it could not act, namely, this exercise of control over Panagra and how the routes were being divided.

The Supreme Court came down and said that even in the area in which the CAB had not acted [24875] and in fact an area which the CAB did not believe it could act, nonetheless it said, "We are going to construe the Act so broadly as to infer a power in CAB to do something about this kind of exercise of control," dismissed the complaint, and this was a matter that CAB should act in.

That does not mean necessarily there has not been a violation of antitrust laws and after the CAB has acted and has found or failed to find it is in the public interest, thereafter if someone violated the antitrust laws they will be subject to whatever remedies the antitrust laws provide.

It is our view of the matter that until that determination is made for the reason given by the Supreme Court, it

would be odd indeed if a course of conduct which could be approved by CAB under 408 could run afoul of the antitrust laws.

So our position was not—that is what I meant in my opening remarks—I was not relying as a matter of fact on what CAB had or had not obtained but only on a recognition that the authority might be in the CAB to act on it. Tomorrow they may say that the way you exercised control over it was in the public interest and we approve [24876] it. That would preclude the enforcement of antitrust violations and therefore we believe that should be determined first.

The Supreme Court said that if you are claiming damages, there is no question the CAB cannot grant you relief for damages, in that footnote in the court decision referring to the Hewitt decision; that in that situation you ought to get a determination of the violation of the law with the possibility you have a remedy of the antitrust laws and go to the court and collect your damages.

The Court: Mr. Hupper, I am sorry, I am not in a physical condition to comply with your request. I am going upstairs now to get this opinion out. I am on trial all day tomorrow. I may have to work on the opinion again tomorrow night. I hope not.

Mr. Hupper: May I express my hope, your Honor, that the argument is not set down on the motion for a stay so as to interfere with our examination of Mr. Hughes starting Monday.

The reason I say that is that we believe very firmly that we have an independent right to examine him quite apart from what happens to Mr. [24877] Sonnett. We intend to vindicate——

The Court: What do you think of Mr. Davis' argument that I don't have jurisdiction on the counterclaim as opposed to the complaint?

Mr. Hupper: I am not sure I understand what his position is, but I do——

The Court: This is very simple. He is going to take you down to Washington.

Mr. Hupper: I think the very simple reference to these counterclaims will show you how completely different they are from the claims made in the complaint. The first counterclaim——

The Court: I know.

Mr. Hupper: The only reference that has anything to do with CAB is the second counterclaim. All the others are completely different. I want to join very wholeheartedly in what Mr. Stewart said about the time and expense that we have to go through in trying to get our first witness on the stand after we had to sit through the other deposition for a year. We want to proceed with this case and prove that there is absolutely no merit to these claims against us.

The Court: Well, all I have before [24878] me is a motion returnable on Friday for a stay of the discovery proceedings. I am telling you I can't hear you on Friday. It would be impossible. I will try some time tomorrow to read the complaint filed with the CAB with greater particularity than I remember it this afternoon and try to match them up.

Mr. Hupper: Do you suppose we could set it for the 18th, which is the return date for our motion to dismiss the counterclaim?

The Court: It is all right with me.

Mr. Hupper: That's all right with us.

The Court: The 18th? That is a Monday? Certainly. Does that dispose of it?

Mr. Hupper: I guess it does. I wish we could have heard and disposed of it right away. I know your problems.

The Court: I don't see how I could possibly do it.

Mr. Hupper: There is a minor thing. You did stay, as far as the TWA people were concerned, all further discovery production until 5 o'clock tomorrow.

The Court: I will put in the additional [24879] defendants too.

Mr. Hupper: The situation is different, Judge——

The Court: Let us not argue with the stay. It extends to all the additional defendants.

Mr. Hupper: Thank you.

Mr. Sonnett: Thirty seconds, your Honor, by way of a report. I don't want to get mixed up with this other question except to say the so-called derivative counterclaim, counterclaim 3, by no legerdemain of Mr. Davis or anybody else can possibly have anything to do with the CAB, and on behalf of TWA I have a very definite interest in that counterclaim. While Mr. Davis is deciding what he means when he says they may elect in effect to cop a plea, he better realize there are derivative counterclaims asserted by him, and for him to stand up and say "We default" is not going, in the judgment of TWA, to dispose of this case, if that is the way he thinks he can dispose of it; it won't meet the problem.

The other thing is a report. I would like to file with the Court an affidavit by one of [24880] my associates and serve a copy on Mr. Davis because this relates to the additional contempt committed and fully ripened prior to 5 o'clock today arising out of their failure to comply in any

respect with your order to make a day-to-day production of so-called tax documents.

Yesterday I wrote them and asked that they produce prior to 5 o'clock today, pursuant to your order, 1961 financial statements and tax returns, and the same for 1962, on the theory they could get those in five minutes. They have declined to do so. This affidavit is an affidavit that we asked for them at 5 today and they refused to do it.

The Court: All right. Thank you, gentlemen.

Pretrial Hearing, February 21, 1963

[24946]

[CAPTION]

Before:

HON. CHARLES M. METZNER,
District Judge.

[APPEARANCES:]

* * *

[24948] The Court: Mr. Barr, I assume that this letter which you gave to the clerk a few minutes ago, with the attachment to it, is in relation to the motion by the additional defendants.

Mr. Barr: It is, your Honor. It merely refers to the documents, and they are not in the courtroom at the moment but they are outside.

The Court: That would be enough to scare anybody.

Mr. Davis: May I ask if that was a letter as to which the Tool Company should be aware?

The Court: A copy of this letter and index will be furnished to each counsel, it says.

Mr. Barr: That is right, your Honor. That is a list of the documents that have been on file before the special master, and I assume Mr. Davis has copies of all of them.

The Court: Have you given this to Mr. Davis?

Mr. Barr: We will, sir.

The Court: Do you want to give it to him now?

Mr. Barr: Yes, your Honor (handing to [24949] Mr. Davis):

The Court: The first think I want to dispose of is a notice of motion that was filed by the additional defendants

on January 25, 1963, returnable February 18, 1963, to dismiss with prejudice the counterclaims by the Hughes Tool Company on the ground that the Tool Company deliberately refused to comply with the order of the Court.

I assume that motion is withdrawn, and will be so marked by the Court, in view of the fact that you have embraced that as a ground of the motion returnable today to dismiss the counterclaims.

Mr. Bromley: That is right, your Honor.

The Court: I should also inform you, although you know it already, that the motion that was brought on by the Tool Company to stay the proceedings regarding the counterclaims pending an action by the CAB was denied at the time of the hearing on February 8th. That appears on page 56 of the transcript, and I have so endorsed those motion papers.

We then have a motion by the Hughes Tool Company which was filed with the Court on February 13th, at a quarter to 5, along with a notice of [24950] amendment to that notice of motion, which was filed with the Court this afternoon at 4 o'clock, which requests reargument of the Court's order and decision of February 6th and 7th, and also requests that an order be entered referring to the CAB certain questions set forth in that notice of motion, and also requests an order admitting as part of the record copies of various CAB orders in related proceedings under Section 408 of the Federal Aviation Act.

The notice of amendment of that notice of motion, which was received by the Court at 4 o'clock, requests the Court to stay all proceedings on the complaint as are directed to claims seeking an award of damages pending a final determination by the CAB as to whether the conduct of Toolco relating to equipment acquisitions and financing

of TWA was authorized, approved or required by any order of the CAB or whether such conduct was not inconsistent with the public interest and, secondly, pending a final determination by the CAB with respect to the complaint of Hughes Tool Company and request for investigation, which was filed by the Hughes Tool Company with the CAB on February 6th relating to the counterclaim.

[24951] The application for reargument is denied. The affidavit of Mr. Davis, sworn to on February 13, 1963, is not to be considered as part of this record.

Rule 9(m) of the General Rules of the Southern District requires that on a motion for reargument counsel submit to the court a memorandum setting forth wherein it feels the court erred. Such a memorandum was not submitted to the Court; and, secondly, the Court will not consider affidavits on application for reargument.

The application for an order referring certain questions to the CAB is also denied.

The application for an order admitting as part of this record certain orders of the CAB is also denied. The material that is sought to be admitted was not before the Court on the submission of the original motion and therefore will not be considered as part of that motion.

This refers to two orders of the CAB, those of '44 and 1950, known as 6 CAB 153 and 12 CAB 192. Those orders and the order of the CAB dated December 2, 1960, which is known as order No. E-161195, were considered by the Court and will be considered as part of the record.

[24952] In so far as the notice to amend the notice of motion, which I am now discussing, that motion is also denied. The Court will not stay any further proceedings in this action.

We come therefore to the motion by the plaintiff, TWA.

Mr. Davis: If your Honor please, before proceeding further, may I ask if your Honor would indicate on the record whether or not the affidavit which was annexed to the motion of February 13th, that is, my affidavit dated February 13th, I believe——

The Court: It is.

Mr. Davis: ——may be part of the record. It was intended to be, in part at least, in support of the application for a stay.

The Court: Application for a stay of what?

Mr. Davis: The one that your Honor just denied a moment ago, namely, which was part B of the notice of motion dated February 13, 1963.

I understand that the notice of motion of February 13, 1963, sought, No. 1, an order granting reargument, which I understand has been denied.

The Court: Right.

[24953] Mr. Davis: It also sought a stay, which has also been denied.

The Court: That is right.

Mr. Davis: I understood your Honor to rule that my affidavit in support of both those motions was not to be considered as part of the record for the purpose of the consideration of the order denying reargument.

I am requesting, for clarification purposes, your Honor, whether or not that—all or part of it—may be a part of the record in connection with the motion for the stay, which I understand your Honor is also denying.

The Court: No, it may not be, because that goes to my fundamental decision of February 6th and 7th. Whatever was in the record before the Court on February 6th and 7th will be part of the record.

You applied for a stay at that time and I denied it to you, except that I gave you until 5 o'clock on Friday,

February 8th, to apply to the Court of Appeals for a stay, and you saw fit not to do it.

Mr. Davis: I have obtained the clarification I sought, your Honor.

[24954] The Court: Mr. Sonnett, on your motion, I am ready to hear you.

Mr. Sonnett: In order, your Honor, to get at least myself oriented to what is before the Court today, because I find the Tool Company papers disorient me——

The Court: You just address yourself to what you have asked the Court to do and then you will be oriented to that extent.

Mr. Sonnett: I would like to recall, before coming to the specific motion, to your Honor the portion of the transcript at the last previous hearing, commencing on the bottom of page 60 and going through to 63.

The Court: Go ahead.

Mr. Sonnett: That, as your Honor will recall, resulted in what I am sure the Court and everyone else clearly understood to be agreement by counsel for the Tool Company with a statement which your Honor made at page 62 as follows:

> "In other words, the understanding of the Court is that you"—meaning TWA—"have now an anticipatory default for failure to appear which will ripen at 10 o'clock Monday, February [24955] 11th, on consent of Hughes Tool Company, the only defendant here with the responsibility, I assume, to answer in money damages to your claim. And then you are free to move for a dismissal——"

The Court: There is a misprint in that. I thought he was going to say "Monday damages," but I don't know what they are.

Mr. Sonnett: Well, we will take them any day, your Honor.

It seems to me that that record was perfectly clear and understood by everybody, and I thought including the Hughes Tool Company.

Pursuant to that record, as your Honor knows, Monday came and Mr. Hughes did not appear. We submitted an order to show cause, supported by an affidavit of mine, and that order to show cause seeks, in terms of purely technical relief, that the prayer of the complaint—only the prayer of the complaint—with respect to the amount of damages be amended. I think I indicated—I am sure I did—the last time the reasons for that, and that is the substantive allegation in the complaint stated that we estimated the damages to be in excess of [24956] $35 million; the Tool Company in its counterclaims, referring to the same items of damages in sum identical, said that the damage was $45. Our investigation by our experts proves that the damages on the antitrust claims are in excess of $45 million.

We, I must say, had no reason to anticipate the default of the Tool Company, its wilful and deliberate choice to default, which occurred before this Court at the last session.

I think, therefore, that since the default judgment rule provides that on a default the plaintiff should get no more than the relief demanded in the complaint, the prayer of the complaint can and should be amended to conform to the substantive allegation and that we should thereafter have the hearing on damages which we have asked your Honor to order. No substantial right of the Tool Company has been or can be prejudiced by that amendment.

The Court: What about Rule 56(c)? I am sorry, I meant 54(c).

Mr. Sonnett: 54(c), your Honor, relates, I believe, only to the entry of the judgment by default. That is to say, that the judgment by default, when entered, shall not be different in [24957] kind from or exceed in amount that prayed for in the demand for judgment.

Prior to your Honor's entering a judgment in this action, I think your Honor has complete control over it and may permit amendments to the pleadings and may permit, as we request, a severance of the action as to Holliday. I think your Honor's power is plenary under the Rules until you have entered the final judgment to be entered into the case.

The Court: Let us take one point at a time.

Isn't it perfectly possible—I suppose I have to say this facetiously—isn't it perfectly true that a defendant may be willing to suffer a default for $105 million but will not suffer a default for $115 million? If he is willing to pay $105 million and if you say, "No, I want $115 million," haven't you put him over a barrel?

Mr. Sonnett: I see no tender in the papers of payment of $105 million. If that tender is made, I will be happy to take it up with the TWA board immediately.

The Court: Do you have to go that far?

[24958] Mr. Sonnett: I am afraid so, your Honor, because I think that the determination of the damages which are not liquidated damages—in this case, as the substantive allegation of our complaint points out, we estimated the damages to be in excess of $35 million—since they are not liquidated, it seems to us necessary to be a determination of the amount. That being so and since no default judgment has yet been entered, it seems to me your Honor has the power to grant amendments——

The Court: Yes, I understand that. But what you are saying is that you have a default and you want to hold on to

that default, but at the same time you want to recover more than you asked for in your complaint.

Mr. Sonnett: We don't have a default judgment, your Honor.

The Court: No, but you have a default, and based on that default you are asking for a judgment.

You want to let them off the hook on a default?

Mr. Sonnett: If the position of the Hughes Tool Company—which is what I indicated to [24959] your Honor when I started—had been confused, if their position before your Honor today is that they consent on the money side to your Honor entering a judgment today for $105 million, I can say to you that TWA will not oppose the entry of that judgment.

The Court: Their position has to be they defaulted. They cannot retreat from that position. They have stated on the record that they will not proceed with the deposition or any further discovery proceedings, and they said that Mr. Hughes would not appear on February 11th.

Then they say to you, "You can't get more than $105 million from us."

You say no, you want $135 million.

I have problems with that, Mr. Sonnett, so we will have to hold that for further research by the Court.

Mr. Sonnett: I think 54(c), your Honor, if I may suggest, the first sentence contemplates the situation where there is an entry of default judgment by the clerk, whether liquidated or capable of computation by the clerk under Rule 55(b)——

The Court: If they said that—and I think these rules are very carefully drafted—I [24960] think they would have referred to subdivision (a) of the rule you are referring to, which provides for entry of judgment by the clerk.

Subdivision (b) provides for an entry by the Court. The drafters of the rule did not see fit to distinguish between subdivisions (a) and (b), and therefore I would have to rule that the words in Rule 55, 54(c), "a judgment by default," must refer to both of them.

Mr. Sonnett: I have had called to my attention Moore and a citation purporting to sustain the proposition that where a hearing is had to determine the amount of unliquidated damages—certainly we have unliquidated damages by reason of the substantive allegation—and the defendant participates in the hearing, the court, in the exercise of sound discretion, may permit the claimant to amend his prayer for relief, citing a series of cases. I am reading from page 1823 of Moore's Federal Practice, Vol. 6.

I think your Honor has the power.

The Court: Perhaps we can clarify this whole thing by determining whether you are moving under a default judgment or whether you are really moving under Rule 37(b), subdivision 2 thereof, for [24961] failure to comply with an order of the court. Which are you moving under?

Mr. Sonnett: It was our intention to move under all the rules, your Honor, so as to be sure to get all the relief we think we are entitled to.

In terms of your Honor's discretion on that point, may I say that obviously, if substantively TWA and its minority stockholders are entitled to damages in excess of $35 million, I would think that your Honor's discretion should be moved to permit the amendment if your Honor has the power to permit it, and I think this case holds that you have.

The Court: All right. Go ahead.

Mr. Sonnett: In so far as the severance with respect to Holliday is concerned, your Honor, the reason why, we

had no way of knowing that the Hughes Tool Company was going to choose, as it did, deliberately, intentionally, wilfully, not to defend this case, and when that became apparent to us we then for the first time were confronted with the problem of what to do about Mr. Holliday. We think a severance as to Mr. Holliday is appropriate. We think that undoubtedly, after the judgment has been satisfied, [24962] there would be no occasion to proceed against Mr. Holliday because TWA would have been made whole.

There may be some question of particular injunctive relief that might be appropriate or necessary as to Mr. Holliday individually, but I don't think we need to take a position on that now, except to suggest that it is a possibility and we cannot tell.

The Court: Mr. Davis represents Mr. Holliday in addition to the Hughes Tool Company.

Mr. Davis, are you in a position to say that Mr. Holliday adopts the position of the Hughes Tool Company as indicated on February 8th?

Mr. Davis: Yes, I am, your Honor, and if it will help to solve the matter I am perfectly willing to do so.

The Court: You have objected to the severance in your papers.

Mr. Davis: I do not see any basis for a severance, your Honor. I don't understand what the plaintiff is trying to do by asking for a severance.

The Court: He is an individual defendant who has been served in this action and I am asking [24963] you, are you representing that Mr. Holliday takes the same position of the Hughes Tool Company so that they will be treated together and no severance is needed?

Mr. Davis: Yes, your Honor. The Tool Company is responsible for whatever Mr. Holliday did or did not do. It would have to——

The Court: I think that clarifies that point.

Mr. Sonnett: I would therefore request that our motion for severance of Mr. Holliday be withdrawn, or deemed withdrawn.

Turning to the substantive portion of our order to show cause, your Honor, we have asked in paragraph D for an adjudication that the Hughes Tool Company, by the conduct alleged in the complaint, has violated the relevant provisions of the anti-trust laws and, with respect to the third claim for relief, has maliciously and wilfully injured the business of plaintiff, and that Hughes Tool Company thereby has caused the injuries to plaintiff alleged in the complaint.

In that connection, as I read the affidavit served by counsel for Hughes Tool Company this [24964] afternoon, an effort is made in that affidavit to say that the legal effect of the consciously deliberate default is not or should not be an admission and should not lead to an adjudication such as we requested but rather they should be in substance free to go ahead and litigate any and all issues they would like to litigate.

Of course they would do this on the basis of selecting such evidence as they have that would be favorable to them but denying TWA access to any of that evidence, which is a strange method of procedure and I don't think it has ever been sanctioned by any court.

In so far as the legal effect of what they did and have done on this record, it seems to us clear, your Honor, under the cases, and certainly going back to the Hammond Packing case, that with respect to the deliberate, wilful, conscious choice not to defend against the complaint they have thereby admitted they have no defense. As the Supreme Court said in the Hammond case, they have admitted a want

in merit in any alleged defense, and therefore the allegations of the complaint must be taken to be admitted for the purpose of this proceeding.

[24965] One of the key allegations in the complaint of course is the allegation that the acts alleged caused the injuries described, and this allegation too must be admitted.

When they consented to a default judgment it seems to us, your Honor, that the Court could not issue a judgment of any kind; it would be beyond the judicial power of the Court to issue a default judgment with respect to relief in a private antitrust action without the judgment embodying the determination that the acts violated the law and, as the statute requires, that the acts caused injury to the property or business of the plaintiff.

While we do not urge that they have admitted the amount of the damages, except to say, as they do in the counterclaims, that the damages to TWA were $45 million, we do think that is an admission sufficient so that we can say to your Honor we want three times $45 million simply because of what they say in the counterclaim.

We think there has to be a hearing to determine what are the unliquidated damages. Nevertheless, the legal effect, the irrevocable legal effect, of what they have done is to admit what we [24966] have set forth in paragraph D of the order to show cause.

One additional and, I think, wholly independent point in that connection is that by the deliberate and conscious and wilful choice with respect to their default relating to the counterclaims they have there again put themselves, as a matter of choice, in the position where a dismissal of those counterclaims with prejudice is the natural and inevitable outcome, and, if that is so, the result, it seems to us, is that it is now or will be upon the entry of your Honor's

order to that effect res judicata that the injuries to TWA were not caused as alleged in the couterclaims and they would be estopped by the judgment to contend otherwise.

As to the next prayer for relief, your Honor, the adjudication that the Tool Company should divest itself of all its rights, titles or interests in the stock of plaintiff, I have to report to your Honor that our research has not yet discovered a private antitrust suit where divestiture has been ordered. Our research has not discovered a private case where divestiture has been refused. The three, I believe, cases that would be most helpful in rela- [24967] tion to Section 7 are not cases where the question was ever reached. It was not reached in the sugar case, although in that case the prayer in the complaint asked for divestiture. The fact is that the prayer was not pressed during the case, your Honor. So that we have no specific precedent relating to a private litigant.

However, I need not remind your Honor of the Du Pont case, or the words of the Supreme Court concerning remedy——

The Court: I had the Du Pont-General Motors minority stockholders suit. I am completely familiar with that.

Mr. Sonnett: Having mentioned the Du Pont case, let me pass to the point that if ever a case called for divestiture, this is the classic case that called for it, because these are the kinds of abuses which I think Section 7 was intended to reach.

In that connection, without pressing the facts unduly, your Honor will recall that in February of 1961, after the voting trust had been in effect, Hughes stated—we have his words and they are on a piece of paper, Exhibit A—that Convair need not concern itself about whether TWA would or would not [24968] take Convair 990 aircraft that

Hughes had on order; that Hughes would attend to that matter, and it might well be that Hughes would be back in control of TWA at that time.

I think the record before your Honor factually as well as legally compels the conclusion that the only suitable remedy here is the remedy of divestiture. Certainly any equitable relief short of divestiture will accomplish nothing. We have only to look at the record of what has happened since the voting trust, to which Hughes agreed in November, 1960, was signed and the campaign of attack and efforts by the defendants to impede that voting trust.

Here was a document that thick, worked on by dozens of lawers, articulating a voting trust fully accepted by the Tool Company, and the ink was hardly dry before they tried to tear it to shreds, as they are still doing. So that equitable relief short of divestiture would be no relief at all, your Honor.

As to prayer F of our order to show cause, we think the record before this Court warrants the conclusion that divestiture should not only occur but that it should occur promptly, because the need of TWA [24969] to be relieved of this incubus is still very real. We have the same campaign of harassment, the same attack on the directors, the same attempts to conduct end runs by going down to the CAB and stirring up a fuss there, the same type of harassment to interfere with a management and a board which is trying to do what is right for this air line.

We have curiously at the same time an unwillingness, as a matter of choice, deliberate decision by the Tool Company, to submit these claims to a court having jurisdiction for decision, hence the deliberate choice not to defend in your Honor's court.

Therefore, I submit, your Honor, that the record warrants and, indeed, requires the conclusion that divestiture should be had, and had promptly. There is no other way that this air line is going to be free of the pernicious influence of Hughes short of divestiture.

The final prayer, your Honor, is that we do have, as your Honor will recall, a request for an early date for a hearing to be held before the Court solely for the determination of the amount of damages. We think that is the only question that is open on this record, the amount of the damages, and that your [24970] Honor should have a hearing on that subject. We ask that your Honor have the hearing before the Court because we are confident, and the papers served by the Tool Company today make it all too evident, that a hearing on damages is going to require immediate, decisive rulings by the Court; and with the greatest respect for the excellent job the special master has done, I am confident that we will be running up here every day, interrupting your Honor's other work, or trying to, getting rulings on points that will have to be disposed of. The hearing will be pandemonium, really, in light of the affidavit.

For example, are we going to try the question of a Capitol 880 crash? What does that have to do with the allegations in our complaint and damage? They have admitted the allegations of the complaint and that those activities caused the injury which was described. The only question is how much.

Unless this has firm judicial control, the hearing will turn out to be 10 months instead of 10 days.

I can only say to your Honor, without trying to gild the lily in that regard, that all of [24971] the equipment program of this air line is suspended in terms of future equip-

ment. They have an acute need for short-range jets and for cargo ships. They cannot move on that, they cannot go forward at all on that, in light of this situation.

Your Honor may have noted in the Wall Street Journal that the chairman of the board of TWA said yesterday that if TWA received a substantial award of damages in this case—he was making a speech in Kansas City——

The Court: I do not read the Wall Street Journal. I apologize to any representative of the Wall Street Journal.

Mr. Sonnett: It is not only a fine newspaper, but it is also one of the few, which makes it even finer.

But they did report that Mr. Breech, during the course of a luncheon, I think, while speaking about the air line, stated that if TWA received a substantial award of damages in this case the terms of the proposed merger with Pan American would have to be reopened to renegotiate.

So we have not only the equipment program of the air line being suspended; we have this [24972] merger problem in the background.

In the meantime we have the Tool Company's minions running around Washington trying to create some kind of back fire, and the air line's need for an early determination is just as acute as its need for a full determination of its damages.

So that I am very mindful of the heavy schedule that your Honor has been fulfilling here for some months; and obviously not meaning any disrespect to the Court, but our associates have come to refer to this as the night court because your Honor sets sessions after the conclusion of a full day, which is a great sacrifice on your Honor's part, but I do think the administration of justice overall would be best served by your Honor conducting these hearings as soon as may be feasible, consistent with your Honor's schedule.

As to the counterclaims, your Honor, that will be argued to you by others. We have joined in the motion to dismiss the counterclaims with prejudice, and the only point, so far as TWA is concerned which it has that the additional defendants do not have, is our prayer in paragraph I of the order to show cause for interim injunctive relief.

[24973] There, as the Court will recall, we asked that there be injunction against impairing or interfering with the voting trust pending the consummation of divestiture. It seemed to us that that was the easiest, most effective, most precise and simplest way to maintain the status quo, at least in terms of additional attack by the Tool Company, until the divestiture could be consummated.

The other aspect of paragraph I which we think this record warrants, and, indeed, which TWA needs, is an injunction, also pending the consummation of divestiture, against instituting or threatening to institute or causing to be instituted suits in any other jurisdiction in which TWA, its directors, officers or employees are parties, which suits embody the allegations of the counterclaim. We think that we are entitled to that bill of peace.

The Tool Company had its opportunity to litigate all of these matters in this court with its eyes wide open and, I am sure, fully conscious that they were better off not to have the truth come out than to have it come out. They decided not to defend this case and not to press their counterclaim. I think they are entitled to peace and [24974] quiet until the Court finally issues the relief by way of judgment. We think we are entitled to the damages and divestiture.

That is all I have, your Honor, unless you have a question.

The Court: Mr. Davis.

Mr. Davis: We want the truth to come out. We would have the truth if we had answers to interrogatories.

So far as lack of financing that apparently is bothering TWA now and which in the past the Tool Company provided is also the basis for which this complaint has been filed against the Tool Company.

One thing that counsel for TWA says—and I am sure it must be inadvertent—and that is when he refers to the page of the transcript he referred to and then, in the course of his statement, makes references to the Tool Company having consented to a default judgment.

I want to make it clear that the Tool Company has not consented to a default judgment, does not consent to a default judgment and does not intend to.

The Court: You said you would not [24975] proceed and Mr. Hughes would not appear, and now the Court is presented with what it is going to do to you.

Mr. Davis: That is correct, your Honor. There is a big difference between saying that the Tool Company, for the reasons it stated at the time and by reason of the practical effects with which it was confronted, by reason of the proceedings today, to take the stand that it took, fully aware as to what might be the consequences should it prove to be wrong, and another thing to say that we are consenting to the entry of a default judgment. I believe that counsel for TWA is fully aware of the distinction, as well aware as I am sure the Court is.

Your Honor, I realize and I will apologize, if I should, for the time when we filed this affidavit in opposition to this motion brought on by an order to show cause, and I don't know whether or not to assume that your Honor has had an opportunity to even——

The Court: I read it very carefully, Mr. Davis.

Mr. Davis: Then it should not be [24976] necessary for me to repeat what is set forth in that affidavit.

There is one thing I would like however to address myself to most seriously, particularly in view of the decision of the Court with respect to our motion on reargument, and that is that it is still imperative that this Court determine what it is in terms of conduct by the Tool Company which is the basis for these alleged damages, as well as what is the scope of what is to be adjudicated by any default judgment.

In that connection I am sure it is not necessary for me to point out that the Court has a continuing duty to consider its jurisdiction based upon the development of facts whenever they occur in the course of this proceeding.

The Court: Mr. Davis, you are leading right back to directing Mr. Hughes to appear for examination. Is that where you want to go?

Mr. Davis: No, your Honor. I believe it was a decision by your Honor when this Court recognized that a plaintiff has the burden of satisfying the Court as to its jurisdiction; but, however that may be, certainly the plaintiff has the [24977] burden of establishing what it is he claimed injured him, and there is no question that that must be causally connected to the alleged violation that the plaintiff is claiming, and I am merely suggesting to your Honor that we can approach this question of causal connection between damage or injury and a course of conduct when we know what the course of conduct is.

There is no question, based upon the position we have taken, all the well-pleaded facts of the complaint are binding upon us, not the conclusions of law set forth in the complaint.

For instance, let me refer to the offenses charged in paragraph 9, particularly paragraph 9(b) of the complaint —that was quoted in your Honor's decision of February 7th—where it is said that there was a combination to re-

strain interstate and foreign commerce in violation of Section 1 of the Sherman Act "by providing financing of the acquisition by plaintiff of aircraft, including jet-powered aircraft, only upon the condition that plaintiff acquire all such aircraft from defendant Tool Company." The key word there is "such."

It is a very well-drafted complaint, [24978] you Honor.

Now we can assume two states of facts. We can assume a state of facts where the Tool Company went to TWA after having acquired control and said, "TWA, we will provide you with all and any financing you need provided that you acquire all aircraft from us and only from us." I am sure that if Toolco had done that that it would be outside the scope of any authorization from CAB.

The other way that this reads, and in fact what has happened, is—because there is no question that TWA required aircraft from everybody, Martin, Lockheed, Boeing, Convair; that is in the record—what this says is, based upon the facts, what occurred is that the Tool Company, when TWA was unable to finance itself, would place the order for TWA, finance the aircraft and make them available to TWA. There is no question that the financing we provided in this case was only the financing for all the aircraft acquired from the Tool Company. That is also what the English in paragraph 9(b) means. That is the kind of conduct which I think was specifically approved by the CAB, because [24979] those are individual transactions which CAB approved.

Now, there are allegations in this complaint that there were delays in the acquisition of aircraft, on 880. All right. There were delays. Delays from when? Delays by reason of conduct by Toolco which is a violation of the antitrust laws or delays because Convair was unable to deliver or TWA

could not obtain financing from these monopolies who control the financing of aircraft?

TWA, who is so anxious to bring out the truth, but they don't want to tell us ever, and all the depositions we took of TWA officers they were unable to tell us ever, what it is that the Tool Company did. They can talk in terms of conclusions of violations of law and state in a complaint what the statutes say and say we violated them, but no officer of TWA has been able to do it to date, and the record is there for anybody to read, and the special master listened to all of it, to find out from responsible officers of TWA what it is that we did. That has yet to be established.

I am not suggesting that this Court conclude that this complaint states the cause of action. [24980] Let us find out what other facts are well pleaded which identify the course of conduct that Tool Company engaged in and from which we can relate any question of damage to TWA.

What is the course of conduct that the Tool Company engaged in while it was a 78 per cent owner of TWA which harmed TWA? What is the course of conduct that TWA engaged in which was outside the specific approval of CAB? Those problems still exist.

In opposition, as basically set forth in this affidavit, notwithstanding the risk we have taken, we respectfully submit that we still have a problem of some procedure of requiring the plaintiff, based upon what the plaintiff knows or claims to know we are not going to be in a position to pull out any evidence, as Mr. Sonnett has suggested to oppose them. Whatever testimony the Tool Company or Mr. Hughes otherwise would be able to adduce, we are barred from this. We take that handicap.

Let them put any officer of TWA, or whoever else they want—the lending institutions who participated in these

transactions—let them [24981] put them on and prove what we did or give some evidence of what we did. All I ask is to cross examine. Use their own documents. That is all I want to know: What did we do? That is what TWA has successfully resisted, but only in this sense. Your Honor affirmed the decision of the special master that they were to answer the interrogatories but provided they were to be answered only after the deposition of Mr. Hughes. We put that one to rest, at the risk we have taken, to be sure.

We have always claimed that we were in a position that, if TWA was required to state and identify what it is we did, with whatever intent they want to attribute to it, we admit it. Now what?

I believe the defendant has a right to do that if he is confident enough of his position and the facts. I don't think that conduct can be described as contemptuous or wilful, except that it is a wilful decision. It was and is a deliberate decision, fully aware of the risks involved. But that does not mean that we are to be punished because of our effort to save what otherwise would [24982] be the expenditure of millions of dollars because we had sufficient confidence that TWA, by no officer of TWA, by no other witnesses that exist in the world is capable of presenting a case identifying something which we did which can be attributed to a violation of the antitrust laws and damage to TWA, and I don't see any decision that I know of which would justify any other result but giving the plaintiff an opportunity to present its case, we merely to cross examine, and let us discover what the truth really is as to what the plaintiff claims.

They must know something, your Honor. If they were prepared to examine Mr. Hughes for so many months, they must know something. It isn't as though we refused to give them any information. We have given them all the docu-

ments in our file, and then some, relevant or irrelevant, that were called for.

What are these documents he is quoting from? They come from our files.

The Court: He would like to have the tax documents.

Mr. Davis: They have had tax documents, your Honor.

[24983] The Court: The ones I said you were supposed to give him and which you refused to give him.

Mr. Davis: We did furnish tax documents, your Honor, which were granted confidential treatment by the special master. That was very recently, and after we had your Honor's decision of January 10th counsel for the insurance companies then asked for additional tax documents, including the 1961 and 1962 tax returns and some work papers, as if whatever may appear in the tax documents could conceivably be a defense to the counterclaims against the lending institutions.

We have been having a game going on——

The Court: You asked for it. You filed counterclaims for $385 million.

Mr. Davis: There is no question that my client is going to have to take the consequences of whatever I have done, but I am merely pointing out that we are in a proceeding where we must carefully distinguish, when TWA asks for something, with those who control TWA, the additional defendants, deriving a benefit from the position taken by TWA, and when the present management of TWA conversely— [24984] which is all that is being represented in court, not the stockholders—takes a benefit out of the position being taken by those who install and are controlling that management, the lending institutions—I know they would like to prevent us from voicing our objections to the manner in which the air lines have been operated, to having

this air line continue to be controlled by these lending institutions who acquired control without approval of any agency, and I don't think it is proper to try and still us, and whether or not they approve or disapprove of any suggestions or comments made by the Tool Company in 1961 I don't think is a basis for seeking this injunctive relief which counsel representing the present lender-control management of TWA is seeking. All we have done is to take the position that we do not believe that this plaintiff can establish facts which cause damage to TWA.

We respectfully submit that before there can be any effort at determining what those damages are, it is essential and we think that finally we are going to be entitled to require TWA to identify that conduct, and then we will be able to determine the extent to which the Tool Company may be answerable [24985] in damages to its 78-per-cent-owned TWA, assuming that a prior position with respect to the jurisdiction of this court is not sustained.

I do want to point out, however, in this connection that it could very well be that in the course of the development of the facts as to the conduct which TWA establishes as a basis for these damages the Court may very well want to reconsider its jurisdictional decision, because, your Honor, if there is one thing——

The Court: Let me ask you this and maybe we can cut it short. Mr. Davis, are you interested in a quick review of my prior decisions? If you are, isn't it possible for you, counsel for the plaintiff and counsel for the additional defendants to get together and draw a judgment which would be appealable without reference to either the special master or myself for the ascertainment of the specific relief required?

I think the Court of Appeals might look upon that as a final judgment, and you can get up there as quick as you

want and have this all reviewed instead of spending the time and effort and the exorbitant amounts of money you refer to.

[24986] Mr. Davis: Your Honor, I will be glad to entertain that suggestion. I frankly would have to say to your Honor that I don't believe that is feasible.

We have been trying for some time, in fact, even before this case was assigned to your Honor for all purposes there was an effort made by Judge Ryan, to get the plaintiff to put up some statement as to what its position was——

The Court: We will pass that point now. All I am asking you is that if you are really interested in a fast determination of the propriety of my prior orders, especially the ones of February 6th and February 7th, would it be possible for you, Mr. Sonnett for TWA, Judge Bromley, Mr. Chanler and Mr. Stewart to get together and agree on a form of judgment which you think would be appealable and save all this time and effort and money which is undoubtedly going to have to be spent if you go through the long, drawn-out procedure of the hearing on the default judgment?

If I am wrong on what is the fundamental question as I see it from you, that this Court has no jurisdiction and you don't want a Panagra situation [24987] all over again, where you go through the court for seven years and the Supreme Court says you should not have been there, you should have been before the CAB, find that out now.

Mr. Bromley: I won't entertain your suggestion, your Honor, I will accept it right now.

Mr. Davis: May I address myself to something in that connection?

Mr. Bromley: All you need is a 54(b) certificate, your Honor, as far as the additional defendants are concerned.

The Court: We also have the problem of TWA as a plaintiff, and I would not want half of this to go up without the other half.

Mr. Bromley: I will be glad to join in that, your Honor.

Mr. Chanler: We join in that, your Honor.

Mr. Stewart: We join in that, your Honor.

Mr. Davis: I would love to join them, your Honor, if I thought I could get what we are all seeking to do. The problem I have is twofold. One is what my position is if I consent to a judg- [24988] ment——

The Court: The old antitrust consent judgments say you don't consent to anything even though you consent to the judgment.

Mr. Davis: I understand that, your Honor, but I have real concern based on the research I made to date on that question.

Unquestionably it would require certification under 1292(b), unless something which occurred today gives me a right of review.

More important than that, your Honor, and quite sincerely, I would much prefer to be in a position of obtaining a review by the Court of Appeals after we have put some meat on this complaint, and the meat that I am referring to, your Honor, is the identification of what we did, because, your Honor, the thing that is disturbing me—and I did not reach the same conclusion that your Honor did in his decision of February 7th—I have read that decision more often than I read the Panagra decision, and I think I understand it at times——

The Court: You mean me or Panagra?

Mr. Davis: Panagra I had no difficulty with. I galloped through it and enjoyed every [24989] moment of it.

It occurred to me, your Honor, that what I just demonstrated with respect to paragraph 9(b) of the complaint could very well be the key to the answer as to which way the decision ought to go. In other words, it is perfectly clear, your Honor, 408 refers to the acquisition of control, not merely the acquisition of stock. The acquisition of control necessarily means, by the rule of reason if nothing else, that you must be permitted to do something.

The Court: You were permitted to get control.

Mr. Davis: Does that mean sit there with the stock in my vaults? It is control over management and therefore decisions.

The Court: You and I are going to get into an argument about my decision, and let's not do that.

Mr. Davis: I am referring to the Court of Appeals, your Honor, and the desirability, if it is possible, in this procedural development—if it is possible for the purpose admittedly of furthering what has to be done in any event if they are right, [24990] that they are entitled to money damages—Mr. Sonnett just pointed out that they want that quickly and TWA needs money very badly. They have somebody else in control with more money than we have but apparently it isn't coming very easily. If we are going to get ourselves any posture to determine those damages, because there is no question we are not going to get together on that question——

The Court: The amount? They review it with the damages open. They have done that in the past.

Mr. Davis: If we are going to have to, or if we assume there is this damage which they are anxious to bring on as soon as possible, would it not make more sense, may I suggest, to have as a preliminary procedure an identification of this course of conduct which your Honor's prior decision

did hold was to be finished by the plaintiff which then would permit a much more definitive decision not only with respect to this question of primary and exclusive jurisdiction but also for the purpose of determining damages, assuming that is the result to be obtained?

The Court: If I am wrong you are not [24991] going to need such a statement to prove I am wrong. I spent a lot of time on this and I am convinced I am right until I am told I am wrong by those who can tell me I am wrong.

I am merely saying that your time, other counsel's time, and, I am sure, the tremendous amounts of money that would be involved before you ever got a review of my determination if you follow the course you are suggesting could be saved. If I am wrong on the question of exclusive primary jurisdiction, let us find it out now and get that out of the way before you spend another nickel; and if I am wrong, you can go down to the CAB and they can have all the fun with this lawsuit that I am having.

Why don't you do that now? And I am sure that in view of what Judge Bromley said and the other counsel for the additional defendants, although I have not heard from Mr. Sonnett yet, they would facilitate the preparation of such a document to completely protect you to the extent that you need protection and still would come up with a judgment that would be reviewable by the Court of Appeals.

[24992] Mr. Davis: Your Honor, I certainly will cooperate with anyone who submits to me a document that they think I ought to give serious consideration to. I am merely pointing out in all fairness that I do not believe that will solve the problem.

The Court: You mean if the Court of Appeals says that I am wrong and you should go down to the CAB, that does not solve the problem?

Mr. Davis: No, your Honor, I am referring to the procedure of our preparing or their preparing for my approval a proposed form of judgment that would be reviewable. That is what I do not believe will be feasible. It would require certification by your Honor, and I assume this implies you would be willing to do so.

The Court: I am not sure it involves a certification, but if it does I would be willing to certify.

Mr. Davis: The question is if they can prepare something which I am satisfied protects my clients' interests. That is a procedure I want to pursue. I am willing to try.

The Court: When do you want to sit [24993] down with counsel and try?

Mr. Davis: Any time they are prepared to submit something for me to consider.

Mr. Bromley: I will give him something tomorrow morning at 11:45, your Honor.

Mr. Davis: I am going to take this weekend off.

The Court: Give him the weekend, Judge Bromley.

Mr. Bromley: All right. I will, reluctantly.

The Court: Mr. Sonnett.

Mr. Sonnett: Your Honor said you had not heard from me on this subject, and I am most reluctant to try and agree with Mr. Davis on anything, even the form of a judgment, because I don't think we start from the same premise at all and I can see just wrangling and a waste of time involved.

My understanding is, and I believe it is the understanding of the Court, that the rule, 55, that we are talking about—55(b)(2)—is an outgrowth of the old equity rules, and it is my understanding that for at least a hundred years it has been settled under our rules that a decree pro confesso [24994] which is what we have here, in effect admits all the allegations in the complaint.

I would like to invite your Honor's attention to Thomas vs. Wooster in 114 US, page 104, that being a very thorough discussion of the pro confesso rules, the old equity rules, where the court stated at page 110, for example:

> "The defendants are concluded by that decree"—this being a decree entered on default—"so far at least as it is supported by the allegations of the bill taking the same to be true. Being carefully based on these allegations and not extending beyond them, it cannot now be questioned by the defendants unless it is shown to be erroneous by other statements contained in the bill itself. A confession of facts properly pleaded dispenses with proof of those facts and is as effective for the purposes of the suit as if the facts were proved and a decree pro confesso regards the statements of the bill as confessed."

Further, at page 111, the Supreme Court said, and it is only one sentence, your Honor, so I will trespass long enough to read it, if I may:

> [24995] "We may properly say therefore that to take a bill pro confesso is to order it to stand as if its statements were confessed to be true and that a decree pro confesso is a decree based on such statements assumed to be true and such a decree is as binding and conclusive as any decree rendered in the most solemn manner."

Mr. Davis: How about reading the other part, John?

Mr. Sonnett: I will give the book to you and you can read the balance of it. It might do you some good.

If what we are dealing with here was an effort to agree on the form of a judgment consistent with those rules and consistent with the Rules of Practice as I understand them, I would cheerfully sit down with Mr. Davis right now, but he would not start from those premises.

If he is prepared to do so, that is to say, to discuss only the form without consenting to or waiving whatever it is he wants to try to preserve on this record, if he is prepared to sit down and work on form and to take a form which carries out the [24996] complaint—and I think the form is very easily indicated in our order to show cause—I will be happy to sit down with him.

The Court: I have problems with the order to show cause. I am not sure you are entitled to relief under Section 7 of the Clayton Act. That is one example or one area that I will not agree with you on tonight.

Mr. Sonnett: I will be happy to file a brief or to present argument. I have the cases at hand, if you want to hear me——

The Court: No, not tonight. I think there is really no further point for argument on this motion, and perhaps not even on the motion by the additional defendants. I would suggest that if you don't want to join in this, we still have counterclaims around that can be disposed of and either Mr. Davis sit down with counsel for the additional defendants or the additional defendants can propose a proposed judgment to Mr. Davis which would be appealable. you can follow whichever course you want.

Mr. Bromley: We will follow the latter suggestion and hand him a proposed judgment.

[24997] The Court: All right.

Mr. Bromley: We will do that, so he will be good and rested, by Monday.

The Court: Mr. Davis will have his comments on your proposed suggestions back to you by Thursday night at 5 o'clock.

I hold in abeyance the application by TWA pending a possible resolution of the counterclaim problem.

All right.

Pretrial Hearing, May 2, 1963

[24999]

[CAPTION]

BEFORE:

HON. CHARLES M. METZNER,
District Judge.

[APPEARANCES:]

* * *

[25001] The Court: At the time of the last conference in this matter, which was held on February 21, the Court suggested to counsel that perhaps they could get together on a judgment that would be appealable without the necessity of time-consuming hearings, which would only add to the enormous expense already incurred by the parties to this litigation. It was the hope of the Court that this would expedite the final disposition of the issues involved here.

About the 1st of March I was informed that the parties were unable to agree upon a form of judgment. Consequently, the whole matter is still open for adjudication.

I think that counsel are entitled to an explanation of the delay in disposing of this matter. As you are well aware, the Court was engaged in a criminal trial that commenced on December 7 and was finally concluded with a jury's verdict the day before yesterday, after five months of trial. Despite this long courtroom engagement, the Court has endeavored to stay abreast of the cases, such as this, that have been assigned to it for all purposes pursuant to Rule 2.

[25002] In the instant case we have had seven pretrial conferences during January and February, which Mr. Son-

nett, I think, called the night court proceedings in TWA against Howard Hughes: Of course, during that time there were a number of opinions and memoranda and pretrial orders that had to be gotten out at night and weekends. In addition, during that same period I had the Alexander against Korvette antitrust suit in which there were a number of conferences from five till ten o'clock at night. Luckily, that ended in a settlement last week, which I don't suppose is possible in this lawsuit. And I had the minority stockholders suit against General Motors and duPont, in which two opinions have been handed down during the same period.

So, this is the first chance I have had to come back to this litigation.

Mr. Davis, I have read your brief very carefully. The great problem I have with it, is I don't think it comes to grips with the point which is so evident here. I intend to hand down a formal opinion in which I will state that there is [25003] a finding of a deliberate and wilful default in this case, and predicated upon that fact I can't quite follow the arguments that you are making in your briefs. So I want to call upon you first to say anything in clarification of your position.

Mr. Davis: I will be glad to, your Honor. I am prepared to proceed on that assumption, and the question now is what findings of fact and conclusions of law may the Court properly make which will put the case in a posture for a determination of damages, if any can be proven, by reason of the findings of fact and conclusions of law which the Court makes.

Now, so far as the conclusion of law is concerned, we have the prior decisions of the Court which unquestionably held that under this complaint as framed a plaintiff could

prove a state of facts which would constitute a violation of antitrust laws outside the scope of the Federal Aviation Act. Now, the question is based upon the entire record, because I think it is easily established that under the decisions that whatever sanctions are to be applied under 37 and the kind of default which permits the Court to find an admission of any kind——

[25004] The Court: I don't think there is any question of admission here. You didn't admit anything. You wilfully defaulted under 37(b)(2)(iii). I am going to direct a default judgment.

Mr. Davis: I understand that.

The Court: The facts of the complaint are admitted, not in the sense of an admission saying, "Yes, I did it," but they are true, and the only thing left is how much.

Mr. Davis: Whether or not you go to the extreme position under 37(d), rather than 37(b)(2)(iii), which relates to the production of documents, I believe, anyway, I have been thinking in terms of 37(d) rather than 37(b)(2)(iii) which basically are the same effect.

The Court: The words are the same, judgment by default against that party.

Mr. Davis: Now, the question is, your Honor, what findings of fact and conclusions of law can be made under this record as it exists. You cannot ignore the admissions of the plaintiff that exist on the record.

The Court: I don't think we reach that [25005] point. The plaintiff has been prevented from proceeding because you have failed deliberately to produce the one person whom they needed to adequately proceed on their lawsuit.

Mr. Davis: So they claim. Taking that claim, now, the question is what damages can be established based upon what conduct. Certainly, the plaintiff can establish what

his case is without the necessity of Mr. Hughes to some extent. Certainly, he can prove the commerce that presumably has been affected. Certainly, the plaintiff can say what has happened to him.

All I am saying is that admittedly the plaintiff now is to be given an opportunity, and to the extent that he can show, "I would be able to prove this; this is my testimony. It is not complete because . . ." And the Court has said that is so. So we will assume and admit that had he had Mr. Hughes, Mr. Hughes would have admitted all the things he tries to prove. You can't go beyond that. I heard Judge Bromley yesterday say if they had Mr. Hughes he could prove that he fired Mr. Thomas. Mr. Thomas is available. [25006] We are not to be punished. If the plaintiff wants to rest upon the record today, fine; there is nothing I can do about it. But if he wants an opportunity to establish what we did, after all, damages could be established with respect to what? Not a conclusion of law. The damages that the plaintiff is entitled to have to be related somehow or other to something that the Tool Company did.

Now, whatever Mr. Hughes' intentions were, still the plaintiff has to say this is what we did to TWA and "We want damages." And the question is what did we do which is a violation of the antitrust laws. I don't see how we can avoid that no matter how we approach it.

The effort that we tried to make in our brief was to point out, and that is where the time that we needed that was consumed, was in establishing what was established by the pleadings and the testimony to date on the assumption, the very assumption that your Honor postulated a moment ago, that all our denials were to be deemed stricken, and assuming that was the proper and fair relief, to

which the plaintiff was entitled to as a result [25007] of what has taken place today, admittedly, it is a matter within the discretion of the Court.

We call the attention of the Court to what cases we are able to find that even for that purpose there ought to be a hearing, not merely the ipse dixit is sufficient, but whether there is evidence to establish what it is that they have been deprived of proving by reason of the position taken by the Tool Company.

The Court: Mr. Davis, you were abundantly clear here on February 8th after I had waited for the time to expire for your application for a stay in the Court of Appeals. I think on February 6th I gave until February 8th at five o'clock to apply for a stay in the Court of Appeals. You didn't do it, for whatever reason involved is immaterial. But you didn't do it and you stated to this Court that you would deliberately not produce Mr. Hughes or that he would not appear and this was the result of a business judgment.

Mr. Davis: That is correct, your Honor.

The Court: And you advised your client, you said, of all the sanctions that could be imposed for this deliberate flouting of the order of this [25008] Court.

Now, with that record the only thing left is to find out how much you owe the plaintiff and to strike your counterclaim. You cited some cases here which just are not in point, one in this Circuit, Gill v. Stolow, 240 F. 2d 669, an opinion given in 1957, and in the very last part of the second sentence, which you have quoted here, there is this language, ". . . and general principles cannot justify the denial of a party's fair day in court except upon a serious showing of wilful default."

I think this record is clear that this is a wilful, deliberate default, and you said you take it after advising your client. You say it is a result of a business judgment arrived at by your client. And you say you are doing this because you want to quickly review the correctness of my opinion denying your motion to dismiss the complaint.

Secondly, in the case of Bernat v. Pennsylvania Railroad they say, "In a case where the refusal to produce a document makes it impossible for the plaintiff to prepare or present his case, a default judgment would be the proper remedy." [25009] In that case the statement given by a plaintiff to an insurance company investigating an accident is not comparable to the production of Mr. Hughes in this case, who, I think, is the motivating factor of everything that went on during the times alleged in the complaint. So I am completely unpersuaded. I see no reason to continue the hearing, Mr. Davis, unless there is anything more you have to say that is embraced in this document you handed me after six weeks of effort.

I will direct that a default judgment be entered, that the matter be referred to the Special Master forthwith for a hearing on the amount of damages. You can arrange with the Special Master for the dates to proceed with that. I will retain the jurisdiction and determination of the issue of the divestiture. The counterclaims will be stricken and judgment entered for the additional defendants, and I will enter a formal opinion tomorrow to that effect.

Mr. Sonnett: Would your Honor include TWA in the disposition of the counterclaims with prejudice since TWA also joined in the motion to [25010] dismiss those counterclaims?

The Court: I will do so.

Mr. Davis: Your Honor, excepting to your Honor's decision, may I inquire if there is a possibility that your Honor will contemplate the entry of a judgment in which your Honor will be referring the matter to the Special Master for the determination of damages which your Honor would be prepared to certify for purposes of a discretionary review by the Court of Appeals.

The Court: If that will expedite the determination of the issue I will do so. However, I will think about it overnight.

As I understand your point here, you will pay TWA the money they are entitled to if it is determined that I do have, and when I say "I", I mean the Federal Court for the Southern District of New York, jurisdiction over this case?

Mr. Davis: At this point, your Honor, the question is whether we are prepared to pay TWA whatever we owe TWA, if anything, based upon whatever conduct the Court has found by reason of everything that has happened to date which your Honor is prepared [25011] to hold constitutes in a defined or undefined way a violation of the antitrust laws. That would permit us, I think, to achieve at least the other objective that we have.

Mr. Sonnett: Your Honor, I am informed that the clerk of the Circuit Court of Appeals will not docket for hearing before the summer recess any matter at this time, except by special direction of the Circuit Court of Appeals. While I am sure that I would happily join in any review of your Honor's decisions, it seems to me that any attempt to procure a review prior to the final judgment will not succeed at this time unless the Circuit Court decides to set this down specially.

Mr. Davis: We always have to get the Circuit Court to agree to a date.

The Court: They have ten days in which to act on the application. If I were to grant the 1292(b) you must apply within ten days to the Court of Appeals to have the matter come up.

Mr. Sonnett: I am speaking only as to the question whether this matter can be heard.

The Court: You will know that within ten [25012] days. They will let you know whether you are coming up or not. You can argue with them that it would be wasting time if you are going to be held till the Fall.

Mr. Davis: I understand, your Honor, in any event, the dismissal of the counterclaims will be in the form of a 54(b) judgment which will be appealable, anyway, and we might be able to get both things up together.

The Court: It doesn't make much sense for one to go up without the other.

Mr. Davis: A form of judgment referring the matter to the Special Master for determination of damages on whatever ground rules to be established which would be certified would permit us to go.

The Court: I will think about that overnight.

Special Master's Decision re Attorney-Client Privilege, September 15, 1962

* * *

[18336] I am ready to rule on the matter.

First, I will sustain Mr. Furth's request and application that there be a detailed list furnished all parties of these documents that are claimed by the Hughes Tool Company to be privileged.

Secondly, I will overrule the application of the Hughes Tool Company to defer the question of whether or not the documents are privileged, and I will now order that they be produced at this time, as soon as possible, by the Tool Company to all parties, for the following reasons:

First, I consider that there has been an express waiver of any privilege as to those documents by the pleading in paragraph 40, where it is said in so many words that this issue as to whether or not action was taken on the advice of counsel, both as to malicious [18337] interference and as to antitrust violations, was claimed as a defense. And by the very nature of the Federal Rules and the discovery proceedings, as long as such an allegation is stated in a pleading, it gives the parties a right to discover any evidence properly relevant with regard to that allegation, and the parties do not have to wait when documents are required to be produced prior to the time of oral depositions until the oral depositions are taken. They are entitled to have the documents bearing upon that issue, so that they can determine the validity of the issue, any defenses that they might have to it, and any other assistance that may be obtained from such documents as bear upon it.

I think the question is properly whether or not that issue was tendered by the pleadings as of March 15th, but in any event, it is now a part of the pleadings, and therefore tenders the issue, and the parties are entitled to as

much information as they can obtain within the rules and the law to determine the validity of the issue.

Secondly, I believe regardless of any pleading there have been numerous waivers by affidavit in which the whole question of the legal advice over a long term [18338] of years to the Tool Company has been presented in support of claims in legal proceedings, and by all of that action I consider that there has been a waiver, and that it is not available to the Tool Company to say "We will tell you how much of the advice we will disclose to you and withhold any more other that there might be, if that is the case."

I don't mean by that that I am saying that any of this evidence would indicate that it was inconsistent. I am saying that the principal law is that once it is tendered in legal proceedings that certain advice was given, you have a right to find out all about it, so that you can find out whether the construction of the Tool Company of the advice that it received was a proper one, or whether it chose a portion of the advice to rely upon, and rejected the other.

All of those things, it is my opinion that the parties have a lawful right to inquire into.

I do not accept the proposition that these matters have to wait until some later date, because in effect I treat it as though by putting the matter in issue, by presenting it before the Courts in affidavits, the documents are without a privilege right of any kind, and therefore they are just like any other docu- [18339] ments, and must be produced under the orders of the Court, and the full sanction, not only as to striking a paragraph of the answer, but all other sanctions under the rules apply as though the documents, if they are not produced, were any documents that a party failed to produce without any privilege attached.

It is so ordered.

* * *

Special Master's Ruling on Date of Hughes Deposition, October 25, 1962

* * *

[18412] The Special Master: Anything further, gentlemen?

I am ready to rule on this application of the Tool Company to adjourn the deposition of Mr. Hughes and order the return date of the notice for the taking of the deposition and the return date of the subpoena be adjourned.

[18413] Before telling you what my final ruling regarding the matter will be, I want to advise you of the various considerations that I have been taking into account in addition to your memoranda, your arguments, and the various papers that have been filed.

In the first place, I do not conceive that Judge Metzner set the date of October 29th as a date that necessarily bound the Special Master as to when the deposition of Howard Hughes should be taken, but it was an indication of the thinking of Judge Metzner, and it was to control, depending upon developments in the interim, at least up to October 22nd.

I also have in mind the statement of Judge Metzner in his order, I think it was in July, in which he modified the order concerning the manner in which depositions should be taken, and said, in words similar, but I am not quoting him exactly, that we must not lose sight of the plaintiff's rights in this litigation.

By reason of my position as Special Master, and my attendance at these proceedings, I have been in a position to determine whether the parties have cooperated, whether they have been diligent in their efforts to discover, in producing documents, and I find that [18414] the parties have all cooperated in producing documents in accordance with the Court's order and the orders of the Special Master, that

the Tool Company has diligently proceeded with the discovery proceedings in taking these depositions.

There are several matters pending before the Court which have not been decided, and I think it is important to this litigation that we have the benefit of Judge Metzner's decision concerning them.

I also recognize that Judge Metzner is very busy with the day-to-day business of the court that he has to conduct in the trial of cases, that he has several large matters comparable to this one which have been assigned specially to him by the presiding judge of the court, and there is only so much of his time, by necessity, that he can devote to this litigation.

Therefore, it can only be expected that it would take a reasonable time to get a disposition of the matters pending before him and others that may necessarily be presented to him regarding the problems relating to discovery in this action.

I think that we must take this into consideration both as to the Rule 16 application now under submission and ruling of the Special Master concerning the [18415] privileged documents claimed by the Tool Company, but which, as I understand it, has not even been submitted to Judge Metzner yet because he has not set a time for presentation of that matter to him, as I understand it.

The question has been raised by counsel for the Tool Company as to whether or not there is any cause of action here that can be properly pursued on the ground that the Court does not have jurisdiction of the subject matter.

That issue is not one properly before the Special Master. I have no jurisdiction to pass upon that question.

However, I think it is important to the litigation, and the right of any of the parties, to discover, in that there

can be no benefit of a final judgment in this action if the Court does not have jurisdiction of the subject matter, and none of the parties can get their claims properly resolved by the Court if there is a true question of that kind in the case.

Therefore, it is, I think, proper that I take into consideration that there is such a claim being made, and that reasonable opportunity be allowed for its presentation at as early a date as possible to the [18416] Court.

The claim is made, as I observe from various papers presented, and argument, that the Court does not have jurisdiction of the subject matter because the primary jurisdiction is with the Civil Aeronautics Board, an administrative body.

While I have no authority to pass upon that question, and do not purport to give any opinion about it, it seemed to me that I should examine it sufficiently to see whether or not it could be a serious issue in the case, and I am particularly impressed with the fact that under the holdings of the Supreme Court generally the question of primary jurisdiction is an issue of whether the administrative body has an expertise that should be applied to the controversy before the Courts act, that the question as developed in the case of U. S. against RCA, California against the Federal Power Commission, a long line of Interstate Commerce Commission cases, the Shipping Board cases, is whether or not the statute provided for a pervasive regulatory scheme and an exemption from the antitrust laws, and in the cases that I have referred to the Supreme Court has called attention to the fact that the Federal Aviation Act is one of the acts in which [18417] such provisions are made.

Special Master's Ruling on Date of Hughes Deposition, October 25, 1962

* * *

[18418] However, whatever the merits of that claim are, it seems to me it is a factor that I should take into consideration with regard to the time for Mr. Hughes' deposition to be taken, and the opportunity for it to be fairly presented to the Court if the Tool Company wishes to press it.

If the argument on jurisdiction goes to the question of motion for summary judgment or motion to dismiss based upon all of the evidence, then it is an entirely different question, and it seems to me it involves the problem referred to by the Court and counsel before, as to whether or not the Tool Company is entitled to get the litigation disposed of without the plaintiff having an opportunity to find out what its counsel now says could be 75 per cent of the facts from one of the witnesses who from the record already developed before us obviously knows some important [18419] things about this litigation. The extent of his knowledge, and the range of it, we do not know at this time.

But the question of whether or not a final disposition on motion could be had of the case, assuming the Court had jurisdiction otherwise, without even an opportunity to inquire as to the knowledge of this important witness, is a serious one.

I am not purporting to pass upon either of those questions, but I have examined them sufficiently so that I can say to you that I think it is proper that the Tool Company have an opportunity, within such reasonable time as can be made available to it, to raise them before the Court, which is the proper place, in my opinion, that those questions be raised.

Special Master's Ruling on Date of Hughes Deposition, October 25, 1962

Then I think we have the question of how far the Tool Company fairly should be permitted to go before we think of other parties in this litigation, not with the idea of exhausting the rights of the Tool Company for discovery, but with the concept that there could be a pause that does not injure it, and allow the plaintiff to proceed with some discovery before returning to further discovery for the Tool Company.

In addition to all of this, it seemed to me that [18420] I must consider and inquire into the problem of logistics.

I do not know how many records these parties will have to move to California to properly examine Mr. Hughes, but in view of what has already happened in this case in the depositions before me, I would think that a considerable number and bulk of documentary evidence would have to be taken by all parties in order to properly conduct any examination of Mr. Hughes. That is one factor of logistics.

Another is the number of lawyers, associates, and the amount of stenographic help that would be involved in such an examination.

Roughly, I guess that there might be some 35 to 40 people, counting those around the table here and those that would have to be working back of the scenes on documents, getting them ready for examination, and the stenographic help.

That may be too large an estimate, or it may be too small. But regardless of how accurate it is, it certainly is a real problem, and it caused me to believe that taking into account two holiday periods, one in November and one in December, it was quite unreasonable and certainly undesirable to contemplate [18421] that many people going back and forth to California several times to try to adjust

to problems and the other considerations involved if we would try to take Mr. Hughes' deposition either on October 29th or during that season.

So I have concluded that the Tool Company should be allowed to complete, within the limits that I will describe, the examination of the TWA witnesses, Mr. Leslie and Mr. Breech, and that I will allow the Tool Company, if it cares to, to make an oral application to suspend the deposition of Mr. Cocke, in light of the fact that his difficulty of recollection up to date has been such that I feel that his deposition has not been very productive, and I should wish to give them an opportunity, if they care to, to use the time to the utmost for productive discovery.

I therefore order that the deposition of Howard R. Hughes be adjourned to February 11, 1963, and that the return date for the notice to take depositions and the subpoena be adjourned to that date, and that the deposition be taken at the same time and place.

I have in mind, in that regard, also the fact that Judge Metzner's order appointing me as Special Master was dated February 7th, and it will be a year [18422] at that time during which the Tool Company has had the opportunity to make discovery.

I contemplate also that such period should give it a reasonable time to present whatever motions it cared to to the Court with regard to the jurisdiction of the Court over the subject matter and elements of primary jurisdiction, or other legal issues of that character, and I would hope that questions in regard to interrogatories will be resolved, that we will have a ruling on the Rule 16 application, and a determination of the right of all parties to any of the documents claimed to be privileged by the Tool Company which is now on appeal.

* * *

Special Master's Ruling on Toolco's Motion to Depose Sessel and Wadsworth, December 28, 1962

[18762]

* * *

The Special Master: I am ready to rule on the motion of the Hughes Tool Company for a direction that following the completion of the present examination of E. O. Cocke, Tool Company may on the completion of the deposition of A. V. Leslie, or in conjunction with his staggered deposition, next depose Ben-Fleming Sessel, and the Irving Trust [18763] Company by Sessel, and Arthur L. Wadsworth and Dillon, Read & Company, Inc., by Wadsworth.

I consider it necessary first to review the record. I shall therefore refer briefly to the prior orders of Judge Metzner and the Special Master in this case.

The priority of Tool Company in the taking of depositions herein was recognized by Judge Metzner in his order of February 7, 1962. In setting the schedule for the taking of certain depositions by the defendant and the plaintiff and fixing the time for taking all depositions noticed by the defendant first, and the depositions noticed by the plaintiff, in the order that Judge Metzner entered. That was the effect of his order.

In his order of March 5, 1962, Judge Metzner recognized this priority by stating:

> "At the outset of the litigation last summer, defendant Hughes Tool Company obtained priority in the deposition discovery procedures."

However, he then went on to say:

> "While the courts have adopted a normal rule of priority, depending on time of service of a notice

> to take deposition, and the necessity for a defendant [18764] to obtain particulars of the charges leveled against him because of the notice form of pleading, such rules are not rigid in their application, and must yield in unusual circumstances to the ultimate goal of prompt orderly and fair disposition of the litigation.
>
> "Furthermore, the plaintiff who instituted the litigation must not be lost sight of in the maze that has resulted from the pleadings.
>
> "The service of a notice to take depositions six months before answer cannot afford the defendant Hughes Tool Company the right of priority insofar as its counter-claims are concerned."

In the order just referred to the Court allowed the Tool Company to continue its schedule of depositions.

> "Limited, however, to evidence which bears on plaintiff's claims against Hughes Tool Company."

He further provided that then the plaintiff should proceed with its schedule of depositions "In the order provided in the pre-trial order of February 7, 1962."

He also authorized the additional defendants to either participate in the depositions conducted by the plaintiff, or by separately scheduling depositions to follow those taken by the plaintiff.

He further provided that at the conclusion of those [18765] proceedings by the additional defendants Hughes Tool Company was to resume and complete its depositions.

On the appeal from the order of Special Master denying the motion of the plaintiff for an order determining that

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Rule 4 of the Civil Rules of the United States District Court of the Southern District of New York was applicable in this case, the Court said:

> "Irrespective of Rule 4, the Court has the power to vary any order heretofore entered fixing priority of depos[illegible]ion—discovery proceedings."

Judge M[illegible]tzner allowed the plaintiff to renew its motion before the Special Master on September 20, 1962, saying:

> "If at that time it is advised that the depositions scheduled upon the completion of the Tillinghast deposition are not moving as expeditiously as possible, and that any further delay in the taking of the depositions of the defendant would be prejudicial to the plaintiff."

In his September 21st order Judge Metzner passed upon and approved the interpretation and conditions expressed by the Special Master as to the binding effect of the subpoena, for which Chester C. Davis, on September 6, 1962, accepted service on behalf [18766] of Howard R. Hughes, obligating Mr. Hughes to appear as a witness for the taking of his deposition. This was to be taken in the United States District Courthouse for the Southern District of California, in Los Angeles, on September 24, 1962, or at any future time that the Court might direct for the taking of Mr. Hughes' deposition pursuant to the subpoena.

Such action was subject to the penalty of grave sanctions which the Special Master stated in his order.

In the same order the Court approved and affirmed "The ruling of the Special Master denying the application of the plaintiff to proceed with the deposition of Howard R.

Special Master's Ruling on Toolco's Motion to Depose Sessel and Wadsworth, December 28, 1962

Hughes on September 24, 1962, to the extent that the return date of September 24, 1962 contained in the subpoena served upon Howard R. Hughes is adjourned by order of this Court to October 29, 1962, at the same time and place.

Judge Metzner further said:

> "The Tool Company may apply to the Special Master on October 22, 1962 for a further adjournment of the date now fixed for the deposition of Howard R. Hughes."

On October 25, 1962, I passed upon the applica- [18767] tion of the Tool Company for a further postponement and set the return date for the subpoena for February 11, 1963.

My order is now on appeal before Judge Metzner.

I wish to refer to my order of October 25, 1962, and so clarify it in this order that there may be no valid basis for misunderstanding it.

In that order I found that all parties had cooperated in the production of documents, and that the Tool Company had diligently proceeded with the discovery proceedings in taking depositions.

I had suggested an application for a Rule 16 pre-trial proceeding to aid in defining and sharpening the issues in this case. The Rule 16 question is now before Judge Metzner.

I set over the return date of the subpoena for Mr. Hughes to February 11, 1963, "and provided that the return date for the notice to take depositions and the subpoena be adjourned to that date, and that the deposition be taken at the same time and place."

Thus, I indicated, and I now wish to remove any doubts about it, that I set the date with the intention and expecta-

tion that the deposition would start at [18768] 10 o'clock on that morning and proceed until it was concluded according to law.

I postponed the date to the time I designated to allow for action in several respects which I described at length. I took into account the witnesses that I thought could be completed by that date, or if not, I planned that there would be an interruption of their depositions.

I named such witnesses as Mr. Cocke, Mr. Leslie and Mr. Breech. In my announcement I referred to the opportunity for the Tool Company to present any motions reaching the question of whether the Court had jurisdiction of the subject matter, and a motion to dismiss the action in the intervening period.

I have overruled motions attacking the interrogatories served on TWA, so as to provide the full benefits of the rules to aid discovery in the interim.

I took into account the people involved and the requirements for moving them as well as the necessary documents and records.

All of this was done in order that there be no doubt left that it was my purpose and intention to proceed with the taking of the deposition of Mr. Hughes by the plaintiff beginning February 11, 1963 [18769] at 10:00 a.m. in Los Angeles, at the place designated in the notice.

I was trying to exercise a judicial discretion in recognition of the need of the defendant to obtain the particulars of the charges leveled against it, and of the further fact that a year will have elapsed by February 11, 1963, since the defendant began taking depositions.

I believed then as I do now that in the light of the discovery that has occurred, the defendant will not be affected

adversely beyond the exercise of a reasonable discretion in light of all the facts to interrupt the taking of depositions merely by allowing the taking of the deposition of Mr. Hughes by the plaintiff.

I also determined that in fairness to the plaintiff it should be allowed at such time to take the deposition of the person by whom plaintiff's counsel have repeatedly asserted they expect to be able to establish 75 per cent of their case.

I considered that the ultimate goal of prompt orderly and fair disposition of this litigation would be substantially advanced by such interruption, and I reaffirm each and all of those conclusions.

[18770] I am now denying the application and motion of the Tool Company to depose Mr. Sessel and the Irving Trust Company by Mr. Sessel, and Mr. Wadsworth and Dillon, Read & Company, Inc., at any time prior to the taking of the deposition of Howard R. Hughes, which is to begin on February 11, 1963, as indicated above.

I do not think it would advance the proper administration of this case since it would in my judgment inevitably branch out into the issues of the counter-claims, or result in such continuous controversy as to the exact limits of such issues that it might interfere with the taking of Mr. Hughes' deposition at the time and place fixed.

Are there any questions?

Mr. Davis: I take it this also covers a denial of the application to take that of Mr. Wadsworth?

The Special Master: Yes. I think I should provide for a prompt time for a review of this order before Judge Metzner if anyone wishes to do so, in light of Mr. Sessel's problems, about trying to go on his trip.

Special Master's Ruling on Toolco's Motion to Depose Sessel and Wadsworth, December 28, 1962

Mr. Davis: May I understand in the light of this ruling, the scheduled depositions which are available to the Tool Company?

[18771] The Special Master: Yes. Mr. Cocke's deposition is set to continue on January 2nd, to the extent that he is to be given a full opportunity to extend each and every question with regard to the years 1959, 1960 and 1961.

Mr. Leslie is to return on January 14th, and continue through that week, and we then reserve the question about what to do with him after that.

If the Court should rule on Mr. Breech, and I feel that while I suggested that he could be deposed as part of TWA's people in my prior ruling, that the Court had that matter or has that matter, at least, under its jurisdiction for determination.

If the Court should determine that he could be deposed, then he would be available.

I want to make it clear that I would expect to interrupt any deposition on February 11th to proceed with Mr. Hughes. I don't want to leave any doubts in your mind, or anybody else's, so that if you feel that that is any modification or change of any prior orders that you wish to seek to review, that you fully understand it, so far as I am holding, that I expect to proceed with Mr. Hughes on February 11th.

Mr. Davis: I have no other question. I would [18772] like to inquire, however, if it would be acceptable to suggest a postponement of the resumption of Mr. Cocke from January 2nd to January 3rd. Mr. Cox and I have been occupied since the last time we have been here, on briefing in the Delaware action, and are proposing to travel out of the city on this forthcoming weekend.

Special Master's Ruling on Toolco's Motion to Depose Sessel and Wadsworth, December 28, 1962

Mr. Cocke may return on January 2nd with a refreshed recollection, but counsel will not be refreshed on January 2nd, particularly if he travels on New Year's Day in order to return here.

The Special Master: I would be disposed to grant that request.

Is there any reason why Mr. Cocke could not be produced on the 3rd?

Mr. Tenney: Not so far as I am aware. I assume that will be all right. I will be in touch with him. I am not sure I can reach him right at this moment. We would have no objection to that as far as TWA, separately from Mr. Cocke.

The Special Master: We will plan on it then for 10 o'clock on January 3rd.

Mr. Davis: Would you undertake to inform Mr. Cocke?

[18773] Mr. Tenney: I will undertake to inform Mr. Cocke.

If there is any hitch in that, I will let you know, Mr. Rankin.

The Special Master: I would like to suggest that for any review of this order, the papers be filed with Judge Metzner by 10 o'clock on Monday.

Mr. Davis: I think that is impossible.

The Special Master: With your problems and all?

Mr. Davis: Yet we ought not to be asked to do it before January 3rd.

Mr. Chanler: Why wouldn't it be possible for Mr. Davis to file the same papers he filed before you, sir?

Mr. Davis: Because I have something entirely new and different now. I have something entirely new and different in the way of a ruling of the Special Master to which I want to address myself.

Mr. Chanler: That affects Mr. Sessel?

Mr. Davis: Yes. What I want to review now is this order.

The Special Master: It is a very short time, and unless there is serious objection, I would tend to grant Mr. Davis time to January 3rd, at 10 o'clock, [18774] in the light of the holiday period that intervenes.

Mr. Stewart: Service to be made on other counsel at the same time?

The Special Master: On all counsel, yes.

I also at this time direct the reporter to send a transcript promptly to Judge Metzner, of this proceeding this morning.

Are there any other questions?

Mr. Davis: I have none.

The Special Master: We will reconvene on January 3rd.

B-470

CAB Order, December 29, 1960

[18912]

UNITED STATES OF AMERICA

CIVIL AERONAUTICS BOARD

Washington, D. C.

Adopted by the Civil Aeronautics Board at its office in Washington, D. C. on the 29th day of December, 1960

Docket 1182

In the matter of the application of

HUGHES TOOL CO.

for approval under section 408 of the Federal Aviation Act of 1958, as amended, of the acquisition of control of TRANS WORLD AIRLINES, INC.

Docket 2796

In the matter of applications of

TRANS WORLD AIRLINES, INC.,
RAYMOND M. HOLLIDAY,
ERNEST R. BREECH and
IRVING S. OLDS

under section 409(a) of the Federal Aviation Act of 1958, for approval of the interlocking relationships as Trustees under a Voting Trust of the stock held by Hughes Tool Company in Trans World Airlines, Inc.

CAB Order, December 29, 1960

By motion filed December 23, 1960, Trans World Airlines, Inc. (TWA), to the extent legally necessary, requests modification of Order 3210,[1] as amended and modified by subsequent orders, which restricts commercial [18913] transactions between TWA and Hughes Tool Co. (Toolco) and between TWA and any subsidiary or affiliate of Toolco to a maximum of $200 each and an aggregate annual expenditure in such transactions of $10,000. Approval, under section 408, is also requested, if necessary, for the transactions contemplated under the financing plan. Similarly sought is approval, to the extent necessary, under section 409 of the Act, of the interlocking relationships arising out of the designation of Raymond M. Holliday, as a representative of Toolco, and of Ernest R. Breech and Irving S. Olds as representatives of the banks and institutional investors, to serve as Voting Trustees under a Voting Trust set up for the Toolco-TWA stock.

The TWA motion herein is the culmination of a series of previously considered motions[2] designed to facilitate the refinancing of TWA's obligations and to provide for its acquisition of jet aircraft[3] and related engines and parts. The prior motions were granted by the Board in Order E-15430, June 23, 1960, and Order E-15561, July 21, 1960 which, among other things, gave general approval, under section 408 of the Act and in accordance with the provisions of Order 3210, to a refinancing plan for TWA of approximately $260,000,000 involving the participation of

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[1] 6 CAB 153 (Docket 1182).

[2] The motions were filed April 1, 1960, April 14, 1960, May 6, 1960 (considered in Order E-15430, June 23, 1960), and July 1, 1960 (considered in Order E-15561, July 21, 1960).

[3] Boeing 707's and Convair 880's.

banks, insurance companies and Toolco. The present application presents a recasting of the original plan, which in its present form, accomplishes significant modification of Toolco control of TWA.

The plan designed to finance the cost of the "Jet Flight Equipment Program" of TWA provides for (a) the delivery of $72,200,000 principal amount of 6% Equipment Mortgage Serial Notes of TWA, maturing serially on December 31, 1961, and quarterly thereafter through December 31, 1964;[4] (b) the issuance of $92,800,000 principal amount of 6½% Equipment Mortgage Sinking Fund Notes of TWA, due December 31, 1972;[5] and (c) the issuance of $100,000,000 principal amount of interim subordinated promissory notes of TWA to Toolco in payment *pro tanto* of the amounts owing by TWA to Toolco at an interest rate not exceeding 7% to mature not earlier than June 30, 1973.

In conjunction with the plan, TWA and Toolco provide for a "Final Accounting and Debenture Purchase Agreement." Under its terms Toolco will transfer title to aircraft, engines and parts to TWA and assign its rights in contracts to acquire such jet flight equipment. Upon the settlement of account of obligations to Toolco, TWA will pay Toolco cash in the amount of $54,892,499.35; $100,000,000 in Interim Subordinated Notes with interest at 6½%; and an additional cash payment of $1,068,356.52, representing accrued interest on subordinated obligations. In addition, TWA agrees to [18914] make a subscription offer[6] to holders of common stock for an aggregate of not less than $100,000,000 and not more than $112,000,000

[4]The "December 1960 Loan Agreement" with Banks.

[5]The "Note Purchase Agreements" with Insurance Companies.

[6]On or before May 31, 1961.

subordinated debentures with detachable warrant rights for the acquisition of common stock.[7] Under the "Hughes Financing and Subordination Agreement,"[8] Toolco will acquire all the subordinated debentures not subscribed to by the remaining stockholders.[9] The issuance of the Subordinated Debentures will provide TWA the means for refunding the Interim Subordinated Notes in the sum of $100,000,000 issued to Toolco by the resulting cash proceeds or by exchange of Subordinated Debentures for Interim Subordinated Notes held by Toolco. As a result, the stock interest of Toolco in TWA, now 78%, may be increased.

Under the terms of the "Hughes Financing and Subordination Agreement," Toolco will provide a revolving credit $50,000,000 in favor of TWA for the period expiring upon the acquisition of the last of 20 Convair 880's which TWA has the right to acquire under the Jet Fight Equipment Program. In addition, Toolco is obligated to lend TWA any sum necessary to insure a net working capital of $10,000,000 until acquisition of the last of the Convair 880's.[10]

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[7]The terms of the debentures and of any stock warrants attached thereto will conform to the recommendations of a special committee appointed for that purpose by and from TWA's investment banking firms. For each $100 of subordinated debentures, the holder shall receive the right to purchase not more than 4 shares of TWA common. The maturity of the debentures may be as late as June 30, 1978.

[8]This agreement is among TWA, Toolco, Irving Trust Company (as Bank Agent), the Institutional Investors, and the Chemical Bank New York Trust Company, as Trustee under the Indenture of Mortgage.

[9]Toolco may not be called upon to purchase more than $100,000,000 worth.

[10]TWA will issue subordinated notes for this obligation. Toolco's obligation to provide the net working capital shall cease if the outstanding subordinated notes equals $50,000,000. Repayment of the subordinated notes, during the period specified, is to be made out of any excess over the required working capital.

Most significantly the financing plan provides measures of assurance regarding the management policies of TWA during the period the securities are outstanding. This is accomplished by a "Voting Trust Agreement,"[11] an "Option Agreement,"[12] and the "Noteholder's Agreement."[13] These agreements provide for a voting trust in respect of TWA stock now held by [18915] Toolco, or thereafter acquired during the life of the trust. The Voting Trust will remain in effect until December 15, 1970, unless previously terminated or extended as provided therein. Toolco, under its right to designate one of the three Voting Trustees has appointed Raymond M. Holliday, a director of TWA. The Notes Agent, acting for the investors, designated the other two Voting Trustees. The Voting Trustees, acting by majority vote, are empowered to exercise their sole and absolute discretion in respect of the TWA stock deposited with them and will accordingly be in control over TWA management and policies. The Voting Trustees, under the trust, may also act as directors or officers of TWA and may engage in transactions with TWA.[15] Compensation for the services of the Voting Trustees is to be paid by Toolco.

Under the terms of the Option Agreement, Toolco is granted the non-transferable right and option, at any time

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[11]This agreement is among TWA, the Voting Trustees and Toolco.

[12]This agreement is among Irving Trust Company (as Bank Agent), The Equitable Life Assurance Society of the United States and Metropolitan Life Insurance Company (the Institutional Investors) and Toolco.

[13]This agreement is among Irving Trust Company (as Bank Agent), the Institutional Investors and Irving Trust Company (as Note Agent).

[14]Now amounting to 5,221,301 shares of TWA stock.

[15]Any approval herein of the plan of financing shall not, unless specifically so provided, be construed as an approval of any personal transactions between the individual Trustees and TWA assuming such approval by the Board should be required under the Act.

after December 31, 1961, to purchase any outstanding Serial Notes by payment in full, and by payment in full of the outstanding Sinking Fund Notes plus a premium of 22% until March 31, 1962. The amount of the premium is thereafter reduced at the rate of ½ of 1% for each elapsed quarterly period of three months.

Upon the Board's grant of the requested modification of the limitations of Order 3210, and the consummation of the refinancing plan, a significant and fundamental change will have been accomplished in the control of TWA by Toolco. Upon the execution of the Voting Trust, the Toolco control of TWA will change drastically in both form and substance. No longer will the directors of Toolco be free to enforce their dictates on those of Toolco's controlling shareholder on TWA. Only one of the three voting trustees will represent directly these interests. Two of the voting trustees, selected by the financial institutions, will be independent of Toolco and of Mr. Hughes.

The voting trustees will not be restricted in their power to approve further financing for TWA, nor in their ability to sell, lease, transfer, hypothecate or otherwise dispose of, or manage TWA's assets. In short, their power to control TWA is as plenary as that of Toolco and its controlling shareholder.

We are advised that it was the insistence of the financial institutions upon the establishment and terms of the voting trust and of the conditions for its dissolution which have been the major stumbling block in recent weeks to the consummation of TWA's initial jet financing program.[16] We

[16]TWA has arranged for the acquisition of 47 jet aircraft. Comparable carriers have acquired, or are in the process of acquiring, jet fleets in the neighborhood of twice this size.

[18916] have not been told officially of the reasons which motivated the decision of the insurance companies and banks to seek this protection. However, we have not been unaware of TWA's problems.

For example, it is a matter of public record that TWA's major competitors arranged the financing for their jet fleets at a significantly earlier date than did TWA. The impact of this fact may be indeed far-reaching. This may have meant that those carriers obtained their financing at a time when funds could be raised on relatively more attractive terms. In any event, it is clear that TWA will pay substantially higher interest rates for its funds than its major competitors. The fact that this disparity in debt burden can play a significant part in the competitive picture is certainly clear.

Moreover, it is probable that the delay in arranging financing has also prevented TWA from securing delivery of a substantially large portion of the jet fleet which was ordered on its behalf. Thus, TWA was unable to take delivery of the twenty Convair 880's, most of which have been available for the past several months. It appears that the failure to receive this equipment as planned may have played a substantial part in TWA's recent inability to maintain its traffic position relative to its principal competitors. Thus, we note, for example, that the carrier's preliminary traffic reports for the month of November 1960 show that TWA's share of the Big Four domestic passenger market has declined from 23.0 to 20.2 per cent. By way of contrast, United, which was behind TWA, has caught and passed it, increasing its share from 21.3 per cent to 29.0 per cent.[17] It appears to be significant that TWA's

[17] American suffered a much less severe decline from 32.0 to 30.5 per cent.

major competitors have already taken delivery of much larger jet fleets than TWA is operating and have firm orders for delivery of more.[18]

[18917] Under these circumstances, we think it clear that Board action to facilitate TWA's acquisition of jet equipment is in the public interest. At the same time, however, it is evident that Toolco's control of TWA, as exercised through Hughes, has presented substantial problems requiring the Board's attention.

In short, and without further description of these problems, the Board wishes to make clear the fact that it would anticipate the proper filing of an application under section 408 of the Act and the obtaining of the approval of the Board before Toolco would attempt to reassume control over TWA.[19] It is clear that such approval would not be

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[18]Apart from the impact on relative traffic position, there are other respects in which TWA may have been adversely affected by the delays in financing and in the delivery of the Convairs. Thus, the delay may have created increased cost of jet crew qualification both in terms of retraining expense and in keeping such crews available pending delivery. (Such crews cannot be used interchangeably in piston equipment; therefore, the crews which have been qualified in Convairs have presumably not been employed in TWA's revenue service.) At least one of the aircraft has suffered from exposure. The cost of restoring the aircraft to operable condition may be sought to be imposed on TWA.

[19]The Option Agreement requires Toolco, in exercising the option, to provide a satisfactory opinion of counsel that the exercise of the option, by purchase of the notes, does not require governmental or regulatory approval or that such approval has been granted and is in force. No such provision could, of course, preclude dissolution of the voting trust after the ten-year term has expired. Nonetheless, it is clear that Toolco should not resume direct control at that time unless prior approval of the Board is sought and obtained.

forthcoming without a searching inquiry into the public interest factors affecting this control.[20]

We turn now to a consideration of the specific transactions and relationships upon which we must act. The applicants seek either a disclaimer of our jurisdiction or our approval of these transactions. Their need is for a prompt and definitive action by the Board in order that they might consummate the transactions by the December 29th date, set for the complicated closing arrangements. The application has necessarily been brief in its statement of these problems and the short period of time between the date of filing and the date by which our action has been sought has prevented our giving to these matters the study and consideration which would be warranted to resolve satisfactorily the question of jurisdiction. In circumstances such as these when we do not find the transactions contrary to the public interest, and where the parties do not contest our jurisdiction, it is certainly better to assume jurisdiction and to act promptly so that the parties might proceed to a satisfactory resolution of the business situation.

[18918] The basic terms of the financing, including the portion involving transactions directly between Toolco and

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[20] *See Trans World Airlines, Inc., Further Control by Hughes Tool Company*, 12 C. A. B. 192, 196 (1950), Docket 2796. "Aside from any undesirable influence on an air carrier which might arise because of the acquirer's interest in a given phase of aeronautics, an acquirer of an air carrier is not without responsibility in other respects for an air carrier's general capacity to perform its public responsibilities. For inevitably the controlling company, by virtue of its investment in the acquired carrier, will endeavor to make itself accountable—as indeed the acquirer here under scrutiny had—for the managerial efficiency, the operating economy, and the financial integrity of the controlled carrier. Accordingly, in determining whether or not a particular acquisition should be approved, it is necessary to consider the over-all impact of the acquirer's plans and policies with respect to the controlled carrier."

TWA, are essentially the same as these heretofore approved by Orders E-15561, dated July 21, 1960, and E-15430, dated June 23, 1960. And we find that, as modified, they are in the public interest and should be approved under the terms of Order 3210, and by exemption under section 416 of the Act from the requirements of section 408.

To the extent that the Voting Trustees shall be considered as officers or directors of TWA and nominees of the directors of Toolco, the interlocking relationships between TWA and Toolco should be found in the public interest and approved.

Raymond M. Holliday, Vice President, Assistant Treasurer and Assistant Secretary of Toolco, is a member of TWA's Board of Directors. By Order E-14251, July 22, 1959, the Board approved the holding by Mr. Holliday of any directorships and offices within the system of affiliated and subsidiary companies composed of Toolco and TWA. In view of the previous approval of Mr. Holliday's interlocking relationships, his serving in addition as a Voting Trustee by Toolco nomination will not adversely affect the public interest. Accordingly, approval to the extent required under section 409(a) of the Act is granted herein.

Ernest R. Breech is Chairman of the Board of Directors of Aeronutronic Systems, Inc., a Ford subsidiary which is apparently engaged in research related to space vehicles and related matters chiefly for military purposes. This is his only association which appears to be an aeronautical enterprise.[21] Since it is not engaged in the sale of products to civil air carriers, it is consistent with our practice to approve this relationship.

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[21] Mr. Breech has offered and will be asked to submit in detail the full information required by Part 251 of the Economic Regulations. Should the information reveal any additional relationships, the Board would be free to act at that time.

CAB Order, December 29, 1960

ACCORDINGLY, IT IS ORDERED:

1. That the restrictions imposed on transactions between Toolco and TWA by Order 3210, as modified by Order E-15561, July 21, 1960, and by Order E-15430, June 23, 1960, are further modified herein to permit TWA to consummate the transactions described in the motion filed herein;

[18919] 2. That TWA be, and it hereby is, exempted pursuant to section 416, from the requirement of section 408 to the extent necessary to enable it to consummate the jet aircraft equipment purchases described and set forth in the motion herein;

3. That this order shall not be deemed a determination for rate-making purposes of the reasonableness of any of the transactions specified herein;

4. That to the extent required under section 409(a) of the Act, approval is granted of the relationships which will be created by Raymond M. Holliday, Ernest R. Breech, and Irving S. Olds, serving as Voting Trustees of the controlling stock interest of Toolco, in TWA, under a Voting Trust Agreement;

5. That this Order may be amended or revoked at any time in the discretion of the Board without hearing.

By the Civil Aeronautics Board:

/s/ ROBERT C. LESTER

Robert C. Lester
Secretary

(SEAL)

Affidavit of Raymond M. Holliday, November 22, 1961

[26974]

BEFORE THE

CIVIL AERONAUTICS BOARD

Docket No. 11620

In the Matter of the
TOOLCO-NORTHEAST CONTROL CASE

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

RAYMOND M. HOLLIDAY, being duly sworn, deposes and says:

1. I am a Vice President, Secretary and the chief financial officer of Hughes Tool Company (hereinafter "Toolco"). I am also a director of Trans World Airlines, Inc., (hereinafter "TWA") and one of the three Voting Trustees of approximately 78% of TWA's common stock which is owned by Toolco and which was placed in a voting trust in December, 1960. I am personally familiar with the facts and circumstances hereinafter stated.

2. The Board's Order E-17675 dated November 8, 1961, refers to the antitrust action filed by TWA against Toolco in the United States District Court for the Southern District of New York (Civ. Action No. 61-2324). The complaint filed by TWA in that action asserts charges

against Toolco, never adequately specified, which may be divided between acts or conduct allegedly occurring prior to December 30, 1960 and acts or conduct allegedly occurring thereafter. *TWA's complaint with respect to acts or conduct prior to December 30, 1960 which may be construed as alleging some form of "mismanagement" are covered in the affidavit of Raymond A. Cook* [26975] *which is being filed in this proceeding. I have read that affidavit and, to my knowledge and belief, the facts and conclusions therein stated are accurate. This affidavit will be directed, therefore, at the charges of TWA concerning alleged acts of Toolco occurring after December 30, 1960 which are characterized by TWA as "malicious and wilful interference" with its business.*

3. In December 1960, in order to assist the financing by TWA of its jet equipment program, Toolco, at the insistence of certain lending institutions, placed its 78% stock interest in TWA in a voting trust under an arrangement by which a majority of the Voting Trustees would be named by the lending institutions supplying such financing. Under this arrangement The Equitable Life Assurance Society of the United States ("Equitable") and Metropolitan Life Insurance Company ("Metropolitan"), as the holders of a majority of certain notes of TWA, have the power to remove the majority of the Voting Trustees, without cause, and designate their successors. The agreement dated as of December 1, 1960 among Irving Trust Company, Equitable, Metropolitan and other TWA lenders provides:

> "The Notes Agent (Irving Trust Company) shall take such action under Article Twelfth of the Voting Trust Agreement to remove either of the two

> Voting Trustees selected and appointed in accordance with § 2 of this Agreement (and any successor to either of such Voting Trustees) or to fill a vacancy in the office of a Voting Trustee appointed by the Notes Agent only if and whenever it shall be directed to do so by a majority of the Noteholders. Any such direction shall specify the action which the Notes Agent is thereby directed to take . . ."

Under the by-laws of TWA, a majority of the Voting Trustees (having the power to vote a majority of the stock) have the power to remove directors of TWA. Since the date of said [26976] Voting Trust the Board of Directors of TWA has been reconstituted by action of the Voting Trustees. Accordingly, Toolco has been required to look to those now in control of TWA for the protection of its equitable interest in TWA.

4. It is inconceivable that Toolco, which has an equity interest in excess of $140,000,000 in TWA, including debts in an amount in excess of $80,000,000, would maliciously and wilfully interfere with TWA's business. It has not done so. *Rather it has acted on the advice of counsel to take steps which its counsel advised were required to protect its equitable rights arising from its ownership interest in TWA.*

5. On May 18, 1961, Toolco learned for the first time through an amendment to the Registration Statement of TWA which had theretofore been filed with the Securities and Exchange Commission, but which had not yet become effective, that the lending institutions in control of TWA were proposing to lend to TWA on a long-term basis

$147,000,000 to finance the acquisition of Boeing jet equipment on a condition which would permit the holders of such additional debt to demand immediate payment in the event that the Voting Trust Agreement should terminate. The practical effect of any such provision would be to prevent the termination of the Voting Trust in accordance with the terms of the Voting Trust Agreement and to extend the Voting Trust until 1977, the term of the new proposed borrowing, and beyond the term agreed to with Toolco in connection with the 1960 financing. Since the additional borrowings were being negotiated with financial institutions having the power to control TWA, *Toolco, through its counsel* [26977] *and upon his advice*, called the attention of those in control of TWA to the self-dealing inherent in said proposed financing and in any attempt to prevent the termination of the Voting Trust in accordance with its terms or to perpetuate the control of said lending institutions over TWA.

6. TWA repeatedly refused to give to me, even though I was a Director of TWA, or to Toolco, any of the details of TWA's proposed additional borrowings. For example, on June 1, 1961, I requested by telegram that I be informed as to the exact status of said financing. A copy of said telegram is annexed hereto as Exhibit "A". This telegraphic request was ignored by TWA and neither I nor Toolco was advised as to the details of said financing until after the filing of the complaint by TWA in the antitrust action.

7. I do not understand how calling to the attention of lending institutions in control of TWA the possible self-dealing inherent in their lending large additional sums to TWA at an interest rate which they fixed and under terms

and conditions which were calculated to perpetuate their control, can be claimed to constitute a malicious and wilful interference with the business of TWA. Toolco's concern was well-founded. Documents produced by TWA in response to a Toolco subpoena show that the same lending institutions, which in December, 1960 had insisted upon and exacted Toolco's consent to a 22% penalty on $92.8 million as a condition to permitting Toolco to terminate the voting trust by refinancing their loans to TWA, required as a condition to providing an additional $147 million of financing, that TWA enter into a supplemental indenture which provides that the maturity of such additional financing may be accelerated [26978] by a majority in principal amount of the lenders, namely, Equitable and Metropolitan, in the event the voting trust terminates for any reason whatsoever other than the voluntary act of the lenders or in the event Toolco acquires all the TWA indebtedness in connection with which the voting trust was created. Of such new indebtedness $107 million does not otherwise mature until December 31, 1977.

8. Another of Toolco's alleged activities since 1960 which the complaint claims constituted wilful and malicious interference with the business of TWA is an alleged attempt to coerce TWA into purchasing certain Convair equipment from Toolco. Toolco has always believed that TWA should be equipped with the most modern available equipment. TWA engineering personnel prior to the acquisition of control by the lending institutions had independently concluded and confirmed Toolco's belief that such Convair equipment would be better suited to certain needs of TWA than other available equipment. Toolco did not seek to force said equipment on TWA. This is confirmed

by proposals made in June 1961 by Toolco to TWA, the Voting Trustees and the lending institutions who now control TWA:

(a) By letter of June 10, 1961, a copy of which is annexed hereto as Exhibit "B", Toolco made three proposals in an effort to arrive at a solution to the need of TWA for additional jet equipment and the financing thereof. Two of said proposals related to Convair equipment. As stated in said letter, TWA was given the opportunity to accept any one or any two or all three of said proposals.

[26979] (b) The first of said proposals was an offer by Toolco to guarantee subscription by the stockholders of TWA to an offering of $100,000,000 of additional equity securities in order to provide needed financing. Toolco expressly stated in said letter that it was not a condition of said proposal "that TWA acquire, to supplement its fleet of jet aircraft, either Boeing aircraft, Convair aircraft, or any combination thereof or any other type of aircraft."

(c) The aforesaid proposal was conditioned solely upon the termination of the Voting Trust with respect to shares of common stock of TWA owned by Toolco. Toolco, however, stated in said letter that it was not its intention to change the present management of TWA and that if the proposal were accepted, Toolco would agree to the continuance of the "management clause" of the mortgage indenture entered into by TWA in December, 1960, which would protect the lending institutions with respect to any change which they might deem to adversely affect their interest in the management of

TWA upon the termination of the Voting Trust. This provision states:

> "If a change of management of the Company shall occur which a majority of the Noteholders shall consider materially adverse to their interests as such Noteholders (the adverse effect of which change of management shall be conclusively established, for all purposes of this Indenture, by the giving of the notice hereinafter referred to), and a majority of the Noteholders shall give written notice to that effect to the Company and the Trustee, the Company will, within 90 days after receipt of such written notice from such Noteholders, effect or cause to be effected such a further change of management of the Company as shall be satisfactory to such Noteholders . . . ."

[26980] The proposal of Toolco to guarantee subscription of $100,000,000 additional equity capital, as well as the other two proposals made in its said letter of June 10, 1961, which did relate to Convair equipment, were not accepted by TWA.

9. The other allegations by TWA with respect to "wilful and malicious interference" with its affairs between December 30, 1960, and June 30, 1961, apparently refer to communications from Toolco's general counsel, Chester C. Davis, including the following:

(a) his writing a letter dated May 19, 1961 to TWA and to the Securities and Exchange Commission, pursuant to the instructions of the Commission;

(b) his writing a letter dated May 26, 1961 addressed to the Board of Directors of TWA, the lending institutions who, under the terms of the Voting Trust Agreement and the by-laws of TWA, control the Board of Directors of TWA, and the Voting Trustees in which he set forth certain matters which materially affected the interest of Toolco in TWA and in which he asked for a meeting to discuss such matters;

(c) his sending a copy of said letter and a telegram to The Boeing Company advising it of certain of Toolco's positions; and

(d) his advising the New York Stock Exchange, at its request, as to Toolco's present intention as to rights received by it from TWA which information was given in order to permit the listing on said Exchange of similar rights granted by TWA to its other stockholders.

[26981] Copies of said communications are annexed hereto as Exhibits "C", "D", "E" and "F" respectively. An examination of such communications is itself sufficient to show that they cannot constitute a malicious and wilful interference with TWA's business, let alone a violation of the antitrust laws.

10. The contention of TWA as to any wrongdoing by Toolco with respect to the merger of Northeast into TWA negotiated by Toolco with Atlas Corporation is so lacking in merit or justification that it does not deserve comment. It is a matter of record that such proposed merger, the consummation of which Toolco believes would have been in the public interest and to the benefit of the stockholders of TWA, was specifically subject to CAB

approval and to the approval of a majority of the stockholders of TWA other than Toolco. I do not know what justification, if any, the majority of the voting trustees have for having failed to recommend favorable action on such a merger or for having failed to take action which would have given this Board an opportunity to pass upon the desirability of such a merger.

11. I have noted the telegram of Eastern Airlines dated November 16, 1961, filed with the Board in this proceeding wherein Eastern suggests that Toolco has some wrongful design with respect to seventeen "large transport jets". Presumably, Eastern refers to the four CV-880 aircraft and thirteen CV-990 aircraft which Toolco ordered from Convair Division of General Dynamics Corporation ("Convair"). The facts with respect to those aircraft are simple to relate and carry no implications whatsoever of wrongful design or potential harm to anyone, unless it be to Toolco itself:

[26982] (a) The original contract for CV-880 aircraft was entered into by Toolco in September 1956 for a total of thirty aircraft. In July 1958 Convair and American Airlines announced the development of the so-called CV-600 aircraft (now known as the CV-990), an aircraft of more advanced design and presumably of superior operating performance. TWA's management, including its President, Mr. Charles S. Thomas ("Thomas") reappraised the equipment needs of TWA in the light of such development. In May, 1959 Thomas advised Toolco that TWA desired to change its first phase jet equipment program by reducing the number of CV-880 aircraft from 30 to 20, and by reducing the

number of Boeing 707-331 aircraft from 18 to 12 or 10. Toolco acquiesced in this management decision of TWA and at its own financial risk undertook to find other markets for the 10 "surplus" CV-880 aircraft and 6 to 8 Boeing aircraft. Six of those CV-880 aircraft were made available to and acquired by Northeast. Six of the Boeings were obtained by Pan American World Airways, Inc. ("Pan-Am").

(b) In November, 1960, Toolco re-offered to TWA the 4 remaining CV-880 aircraft. At that time, TWA and Toolco were advised by Dillon, Read & Co., Inc., TWA's investment bankers, that the acquisition of such additional aircraft should be deferred until after consummation of the financing program then contemplated.

(c) Thereafter, when TWA was under the control of the lending institutions, Toolco once more offered said aircraft to TWA. The current management of TWA, however, for undisclosed reasons, has failed or refused to acquire the use of said aircraft.

[26983] (d) Toolco and General Dynamics are currently having discussions as to the nature or extent of Toolco's obligation, if any, to accept delivery of said 4 CV-880 aircraft or 13 CV-990 aircraft. The 4 CV-880 aircraft have been built to the TWA configuration which is substantially identical to the Northeast configuration. The 13 CV-990's have been built to a configuration similar to or identical with the configuration of American Airlines. I believe that the Board, in the past, has required express approval of transactions between an air carrier and a controlling person engaged in another phase of aeronautics.

12. The Board, in its order of December 29, 1960, with respect to TWA's financing indicated criticism of Toolco's management of TWA for having failed to acquire and order a larger jet fleet for TWA. *As appears from the affidavit of Raymond A. Cook being filed herewith, TWA was unable to acquire any jet fleet without Toolco's voluntarily committing its own credit and resources.* I do not know to what extent the Board's comments may have reflected the then thinking of the airline industry as to the market for jet travel. The industry as a whole now appears to be suffering from too much rather than too little jet capacity. I do not know to what extent the present management of TWA believes that the substantial financial losses of TWA in 1961 are attributable to an over-expanded jet fleet. I understand and believe that TWA under its present management has one of the highest, if not the highest, seat mile costs of the industry, notwithstanding a very favorable average aircraft hop, and that its rate of utilization of its equipment is among the lowest of the major airlines.

[26984] 13. Toolco, which is primarily engaged in the manufacture and sale of equipment to the oil well drilling industry, has never been in the business of supplying equipment to airlines. I understand that by reason of the Board's definition of "a phase of aeronautics", the following activities of Toolco may be classified as being "a phase of aeronautics": (i) its manufacture of two-place helicopters; (ii) certain experimental activities; (iii) its interest, if any, in the CV-880 and 990 aircraft as previously described; (iv) its interest in TWA; and (v) conceivably its creditor relationship to Northeast.

14. In connection with Toolco's interest in TWA it may be appropriate to point out that TWA is apparently

making an effort or planning to make an effort to obtain further financial assistance from Toolco. There is annexed hereto as Exhibit "G" a letter which was delivered to me by TWA's president, Charles C. Tillinghast, Jr. and as Exhibit "H" my reply thereto on behalf of Toolco. I hereby confirm and verify the statements of fact contained in said reply, and in particular the statements as to the continuous growth of TWA's business during the period in which Toolco nominated a majority of TWA's Board of Directors and was in a position to control its business and affairs and as to TWA's earnings during this period which amounted to $95.6 million before taxes. The disastrous deterioration in the business of TWA and the possibilty that Toolco may again be called to come to its rescue has had and is having an effect on the extent to which Toolco is prepared to come to the financial rescue of Northeast. The history of the negotiations between Toolco, Northeast and Atlas Corporation ("Atlas") with respect to Toolco's providing financial assistance to Northeast and [26985] with respect to the possibility of Toolco's acquiring the Atlas position in Northeast is fully and accurately set forth in the Reports filed by Northeast and Toolco with the Board in this proceeding.

(Sworn to by Raymond M. Holliday on November 22, 1961.)

Affidavit of John R. Hupper, July 2, 1962

[26781]

[CAPTION]

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

JOHN R. HUPPER, being duly sworn, deposes and says:

1. I am an attorney-at-law and a member of the firm of Cravath, Swaine & Moore, attorneys for the additional defendants The Equitable Life Assurance Society of the United States, Metropolitan Life Insurance Company, James F. Oates, Jr., and Harry C. Hagerty. I am familiar with all the prior proceedings herein since the date of joinder of said additional defendants.

2. I make this affidavit in support of a motion originally made by plaintiff Trans World Airlines, Inc. (TWA) and in which the above-named additional defendants now join, for an order by the Special Master that Rule 4 of the Civil Rules of the United States District Court of the [26782] Southern District of New York, effective July 1, 1962, is applicable to the instant case. I am not concerned with the termination or continuation of the examination of Mr. Tillinghast or that of any other particular witness. I am concerned with the substantial period of time which separates us from the examination of witnesses crucial to our defense and I am very concerned that when our time to examine eventually arrives the witnesses may not be able to testify.

Affidavit of John R. Hupper, July 2, 1962

3. Accordingly, I believe that it is vital to the protection of the rights of the additional defendants that discovery proceedings be expedited. By order of February 7, 1962, Judge Charles M. Metzner set forth a schedule of depositions entitling Hughes Tool Company (Toolco) to depose 24 separate individuals in a time period that was to terminate at the end of April. We have now been operating under that order for more than four months and the examination of the first witness is not yet completed. In addition, plaintiff is presently entitled under that order to examine 7 additional individuals. I need not speculate about the substantial period of time which will be required to complete those depositions, under the present schedule. Nevertheless, the additional defendants are not entitled to commence their examinations until those 31 have been completed. I think it is fair to say that the time necessary for completion of those depositions must, under almost any schedule, be measured in years. I do not believe that Judge Metzner contemplated any such prolonged proceeding.

4. It is obvious that the passage of time dims recollection, especially of facts of the magnitude and complexity of those presented by the pleadings in this case. Of more importance, however, is what appears to be a real [26783] possibility that at least two vital witnesses should be examined with some promptness if their testimony is to be perpetuated.

5. It is a matter of general knowledge as well as a matter frequently apparent in these proceedings that Mr. Howard Hughes is difficult to find and that his present whereabouts are unknown. For example, Raymond M. Holliday testified on April 9, 1962, in the *Toolco-Northeast Control* case (CAB Docket No. 11620) that he had not communi-

cated with Mr. Hughes since October, 1961, and then he had only received a telephone message. (TR. 794-796). Mr. Hughes' testimony is of great importance to the defense of the additional defendants. I have, therefore, been disturbed by the recurrence of rumors and statements in the public press that Mr. Hughes' hearing and general health are deteriorating. (See, *e.g.*, The Wall Street Journal, April 23, 1962, page 1, Newsweek Magazine, May 21, 1962, page 73, The New York Daily Mirror, May 30, 1962, page 10, and The New York Times, June 24, 1962, Section 3, page 1-R). The Wall Street Journal on April 23, 1962, stated that one of the theories advanced for Mr. Hughes' increasing reluctance to appear in public "is that his health is not too vigorous". In a column by Walter Winchell in The New York Daily Mirror on May 30, 1962, the following appeared:

> "*Memos of a Fugitive* from Broadway: Billionaire Howard Hughes ill? Or is it the trouble caused by enemies? (He's down to 125 lbs. Looks like a ghost)"

I cannot, of course, state whether such information is accurate. It is, however, a major concern to me that the most important witness in this case may be unavailable at whatever time in the future the present schedule may permit counsel [26784] for the additional defendants to take depositions.

6. Another witness whose availability seems problematic is Noah Dietrich. I am informed that Mr. Dietrich is now about 73 years old and that he was from 1925 through 1957 Mr. Hughes' chief adviser. An example of the importance of Mr. Dietrich's testimony is the follow-

ing excerpt from Fortune Magazine of January, 1959 at page 82:

> ". . . Dietrich asserts that he did not appreciate how deeply Hughes was committing the tool company's assets until one day in early 1956 he added up the orders for aircraft on which Hughes had obligated the tool company and discovered that they exceeded Hughes's assets.
>
> "The aggregate value of the orders came, as previously noted, to nearly $500 million. Dietrich had known, in a general way, that Hughes was negotiating with a number of aircraft companies for new equipment; Hughes had discussed with him, during their desultory telephone exchanges, the difficulties he was encountering in deciding among the planes that were available. But numbers and costs had never been precisely mentioned. Hughes appears to have settled on the numbers himself, in independent consultation with T. W. A.'s chief engineer, Robert Rummel. The orders were placed with the manufacturers, the tool company was instructed to draw up the necessary contracts, and its lawyer bundled up the commitments and sent them on to Dietrich, who was then occupying the office on Romaine Street, so that he could present them in due course to the tool company's board of directors for ratification.
>
> "It is impossible for an outsider to determine the merits of the situation that thereafter developed, particularly since Hughes has declined to discuss his affairs. Dietrich says he warned Hughes that he was becoming dangerously overextended, and that

> the only safe way out was to set about arranging for $300 million worth of long-term financing, either in the form of an offering of T. W. A. bonds, to be guaranteed by the tool company, or a combination of T. W. A. stock and tool-company debentures. Dietrich discussed such a project with the Wall Street house of Merrill Lynch and found that firm willing to undertake the marketing. Hughes brushed the idea aside. . . ."

7. Should either of the above gentlemen become unavailable for any reason, it would seriously and irreparably prejudice the rights of the additional defendants. [26785] That is particularly so since, as Toolco's counsel so frequently asserts, Mr. Hughes did not keep files. Thus, the only evidence available on many issues will be the testimony of Messrs. Hughes and Dietrich.

I believe, therefore, that it is imperative that the additional defendants be permitted to undertake at least some examinations in the reasonably near future. Accordingly, I submit that a sound exercise of discretion by the Special Master dictates the application of the principles embodied in Rule 4 to these proceedings.

(Sworn to by John R. Hupper on July 2, 1962.)

Affidavit of Charles L. Stewart, October 23, 1962

[27126]

[CAPTION]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

CHARLES L. STEWART, being duly sworn, deposes and says:

I am an attorney-at-law and a member of the firm of Dunnington, Bartholow & Miller, attorneys for additional defendant, Dillon, Read & Co. Inc. I am familiar with all the prior proceedings herein since the date of joinder of such additional defendant.

I make this affidavit in opposition to the application by defendant, Hughes Tool Company ("Toolco"), for an indefinite adjournment of the date now fixed by the Pre-Trial Order of Judge Metzner, dated September 21, 1962, for the deposition of Howard R. Hughes.

[27127] As counsel for an additional defendant on the Counterclaims, I am not directly concerned with the merits of the litigation between Trans World Airlines Inc ("TWA") and Toolco, nor with the precise date upon which the deposition of Mr. Hughes is taken. But inasmuch as Judge Metzner, in his Pre-Trial Order of March 5, 1962, made my client's rights to oral discovery dependent upon those of TWA, any delay in TWA's discovery necessarily prevents us from discovering and perpetuating evidence which is essential to my client's defense.

The issue now before the Special Master is whether to grant an indefinite postponement of the deposition of Mr.

Hughes, presently scheduled for October 29, 1962. As I understand Toolco's position, it proposes that no deposition of Mr. Hughes be taken until after Toolco has completed all of its discovery with respect to the Complaint, including all depositions which it has heretofore noticed.

It would appear that one result of Judge Metzner's Pre-Trial Order of September 21, 1962, is to preclude the sort of indefinite postponement sought by Toolco now. When this problem was previously before the Special Master on September 15, 1962, the Special Master denied TWA's application to interrupt the deposition then in progress and adjourned indefinitely the subpoena of Mr. Hughes. (Argument of September 15, 1962, pp. 101-102, 105-106.) Thus the relief Toolco now seeks is the same as that granted by the Special Master on September 15, 1962. But when this ruling was appealed to Judge Metzner, it was modified by the Court so as to set a definite date—October 29, 1962—for commencing the deposition of Mr. Hughes.

It is obvious that Judge Metzner intended to put definite limits to the length of time within which Toolco [27128] could prevent oral discovery by other parties. When the question of Mr. Hughes' deposition was argued before the Court on September 19, 1962, Toolco had completed the deposition of but one of some twenty-five witnesses scheduled. (Pre-Trial Order of February 7, 1962.) At the rate of progress thus indicated, there was no real possibility of Toolco completing its discovery by October 29th. Nevertheless, Judge Metzner set that date for beginning the deposition of Mr. Hughes. Plainly he contemplated that while the Special Master was to have discretion as to the precise time when Toolco's discovery was to be suspended, the other parties in the case were to be allowed to proceed with Mr. Hughes in the near future.

Affidavit of Charles L. Stewart, October 23, 1962

What has happened since Judge Metzner's order of September 21, 1962? Toolco continues to take depositions in exhaustive detail. It has finished with one additional witness, Mr. Rummel. There is no indication that it is even remotely close to finishing with Mr. Leslie or Mr. Cocke. Thus Toolco, interrogating steadily for four days each week, has completed only two witnesses in over six months. At this rate of progress Toolco will require some *six years* to complete its twenty-five scheduled witnesses before any other party has a turn. Thus it will make no difference to Toolco whether Mr. Hughes is examined now or six months from now; Toolco will not have completed its discovery in any event.

In its Memorandum of October 22, 1962, Toolco argues that TWA should not be permitted any oral discovery because Toolco has now concluded, based on its discovery to date, that TWA has no claim against it. Assuming this conclusion to be correct, Toolco then need have no fear of TWA's discovery, for it will uncover nothing and will soon be finished.

[27129] Significantly, Toolco gives no reason in its Memorandum why the additional defendants should not be afforded the opportunity to examine Mr. Hughes. Indeed, nearly every equitable consideration advanced by Toolco in favor of its continued discovery applies doubly to the additional defendants. They have been defendants in this case for over eight months, during which time they have been totally deprived of the defendants' normal right to ascertain by oral examination the factual basis for the charges against them. Such documentary production as they have obtained under Rule 34 has proved largely meaningless, for we are told by Toolco either that Mr. Hughes kept no records or that the really significant records are

privileged (despite the Special Master's ruling to the contrary).

Toolco was not required to drag the additional defendants into this litigation. Having done so, it should not be allowed to deprive them of their customary discovery rights by hiding behind the alleged inadequacies of TWA's complaint.

One further matter requires mention. It is becoming abundantly clear that Toolco is endeavoring to turn this case into a test of economic power and endurance rather than an adjudication on the merits. Toolco has but one stockholder—the immensely wealthy Howard Hughes. The cost of this case merely serves to reduce Toolco's tax problem with respect to unreasonably accumulated earnings. Thus Toolco has powerful incentives to prolong the taking of depositions by every device of which astute counsel is capable.

Similar considerations do not apply to the additional defendants, particularly to a peripheral defendant [27130] such as Dillon, Read. Dillon, Read has no control over TWA, no control over the voting trustees and owns no securities of TWA. It is not within its power either to terminate TWA's action or return control of that company to Toolco. From the facts of which I am presently aware, it appears to be entirely innocent of the charges made against it and has been made a party purely as a matter of convenience to Toolco's counsel. Yet Dillon, Read finds itself embroiled, at huge expense, in interminable depositions dealing with a case in the outcome of which it can have no conceivable interest. Surely, every principle of equity requires that defendants so situated be permitted to defend themselves by appropriate discovery before they

have suffered financial injuries which may be irretrievable regardless of the eventual outcome of the case.

WHEREFORE, it is respectfully submitted that the application of Toolco for an adjournment of the deposition of Howard R. Hughes be denied, or in the alternative, if granted, that the adjournment be for a maximum period of thirty days.

(Sworn to by Charles L. Stewart on October 23, 1962.)

Toolco's Notice of Motion, December 4, 1962

[27289]

[CAPTION]

BEFORE THE SPECIAL MASTER

SIRS:

PLEASE TAKE NOTICE that upon all the proceedings heretofore had herein and upon the annexed affidavit of Chester C. Davis, Esq., defendant Hughes Tool Company ("Toolco") will move the Special Master on December 6, 1962 at 10 A. M., or at such other time as may be fixed by the Special Master, at Room 3111, 120 Broadway, New York, N. Y., for a direction that following the completion of the present examination of E. O. Cocke, and absent changed circumstances, Toolco may either upon the completion of the deposition of [27290] A. V. Leslie or in conjunction with his staggered deposition, next depose Ben-Fleming Sessel and the Irving Trust Company by Sessel and Arthur L. Wadsworth and Dillon, Read & Co. Inc. by Wadsworth.

Dated: New York, N. Y.,
December 4, 1962.

Yours, etc.,

CHESTER C. DAVIS, ESQ.
Attorney for Defendant
Hughes Tool Company
120 Broadway
New York 5, N. Y.